

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,)
) Case No. 1:19-CR-00227
) (JLS) (MJR)
Plaintiff,)
)
vs.) April 26th, 2022
) 11:05 a.m.
JOSEPH BONGIOVANNI (1),)
PETER GERACE, JR. (3),)
)
Defendants.)

**TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE MICHAEL J. ROEMER
UNITED STATES MAGISTRATE JUDGE**

APPEARANCES:

For the Plaintiff: TRINI E. ROSS, ESQ.
UNITED STATES ATTORNEY
BY: BRENDAN CULLINANE, ESQ.
JOSEPH TRIPI, ESQ.
ASSISTANT UNITED STATES ATTORNEYS
138 Delaware Avenue
Buffalo, NY 14202

U.S. DEPARTMENT OF JUSTICE,
CRIMINAL DIVISION
BY: JORDAN ALAN DICKSON, ESQ.
PUBLIC INTEGRITY SECTION
1331 F Street NW
Washington, DC 20004

For the Defendant: HARRINGTON AND MAHONEY
BONGIOVANNI BY: JAMES P. HARRINGTON, ESQ.
70 Niagara Street, Third Floor
Buffalo, NY 14202

For the Defendant: JOSEPH M. LATONA, ESQ.
GERACE, JR. 403 Main Street, Suite 716
Buffalo, NY 14203

1 APPEARANCES CONTINUED:

2 Court Reporter: MEGAN E. PELKA, RPR
3 Robert H. Jackson US Courthouse
4 2 Niagara Square
Buffalo, NY 14202
(716) 364-6449

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1 THE CLERK: On the record in USA v. Joseph
2 Bongiovanni and Peter Gerace, case 19-CR-227, for oral
3 argument. Counsel for the government, please state your name
4 for the record.

5 MR. TRIPI: Joseph Tripi, Brendan Cullinane, and
6 Jordan Dickson for the United States. Good morning, Judge.

7 THE CLERK: Thank you. Counsel for defendant
8 Bongiovanni, please state your name for the record.

9 MR. HARRINGTON: James Harrington and Mr. Bongiovanni
10 is here, Judge.

11 THE CLERK: Thank you. Counsel for defendant Gerace,
12 please state your name for the record.

13 MR. LATONA: Joseph LaTona and Mr. Gerace is present,
14 Your Honor.

15 THE CLERK: Thank you.

16 THE COURT: Good morning, counsel. We're here for
17 oral argument on the defendants' pretrial motions. I think
18 we're going to start with the border search. You want to go
19 first, Mr. Harrington, or you want Mr. Tripi to go first?

20 MR. HARRINGTON: Either way. Doesn't matter.

21 THE COURT: Your call.

22 MR. HARRINGTON: I'll go first, Judge. Judge, as you
23 know, you sat through the hearing on this case, and so you're
24 pretty familiar with the facts. I won't go through those, but
25 it's -- this stop was a return from a vacation of

1 Mr. Bongiovanni, his wife, and his stepson. And Buffalo
2 agents from DHS and Border Patrol arranged for a, quote,
3 secondary search, including a telephone search of
4 Mr. Bongiovanni in Baltimore. I think, though, if the Court
5 looks at the documents that are submitted in terms of the
6 emails, it clearly was while a secondary search may have been
7 done, clearly it was targeted towards Mr. Bongiovanni's
8 telephone. And --

9 THE COURT: I think there's no doubt, right, that
10 this search was targeted towards Mr. Bongiovanni's alleged
11 criminal activity up here in Buffalo.

12 MR. HARRINGTON: Correct.

13 THE COURT: Really nothing to do with the border or
14 anything like that.

15 MR. HARRINGTON: Right.

16 THE COURT: Right?

17 MR. HARRINGTON: The only thing that we have anything
18 beyond Buffalo is -- are the words transnational organized
19 crime.

20 THE COURT: I was wondering about that. We'll ask
21 Mr. Tripi.

22 MR. HARRINGTON: I don't know what that is, Judge,
23 transnational crime.

24 THE COURT: I think at one point somebody went to
25 Canada or something. Maybe that's the transnational part of

1 it.

2 MR. HARRINGTON: But, Judge -- so, we have this
3 request that's made. And we have random agents that do it.
4 And they do a random search of his phone. And lo and behold,
5 what do they find? They find a whole list of Italian-
6 American names in Mr. Bongiovanni's phone, some of whom are
7 friends, some of whom were former law enforcement officers,
8 but clearly it was targeted at these Italian names.

9 And I guess that's what's supposed to be the transnational
10 organized crime. I don't know. Nowadays, when I think of
11 transnational organized crime, I think of the Cali Cartel or
12 the Russian Mafia or somebody else. I certainly don't think
13 of the Italian Mafia.

14 So, anyway, they find some names on the phone, take some
15 photographs of what they see, and that becomes what's been
16 seized and what later is used. Now, we clearly recognize that
17 *United States v. Ramsey* gives permission at the borders that
18 are far different than they are in ordinary circumstances, but
19 in *United States vs. Riley*, the Supreme Court made a seminal
20 decision in finding that what we have on our phones is really
21 something that we consider to be private.

22 And in our memorandum, we cited to the Court a number of
23 cases, including *Cano* in the Ninth Circuit and *Aigbekaen* in
24 the Fourth Circuit, and an Eastern District case called
25 *DeCicco* and -- all of which the courts have -- seems to be

1 clawing back from this notion that, or supporting and
2 expanding the theory, that *Riley* has.

3 THE COURT: I don't think there's much doubt if you
4 were in the Ninth Circuit, this would be an easy call.

5 MR. HARRINGTON: Right.

6 THE COURT: Right? I think *Cano* would call for the
7 suppression of the evidence. What you're up against, I think,
8 is this case *Levy* in the Second Circuit, which seems to say
9 that CBP officers, at the request of some other law
10 enforcement agency, can go ahead and conduct a search. And
11 that's totally within the scope of the border search exception
12 to the warrant requirement.

13 Whereas *Cano* said, no, that it's not really a border
14 search, right, that's it's beyond the scope of what CBP
15 officers are supposed to do. And so, you can't have a --
16 you've got to have some suspicion at least as to -- that
17 there's criminal activity. So, how do you get around *Levy*, I
18 guess, is your big thing?

19 MR. HARRINGTON: Well, I think it's somewhat
20 distinguishable, Judge, but also, the issue needs to be
21 resolved at some point in time by a higher court even so. The
22 fact that we have a case that you may find controls you does
23 not mean that Mr. Bongiovanni shouldn't preserve this issue.

24 THE COURT: Oh, no. I'm not saying that at all. I
25 think it's a very close question. I'm just asking, is there

1 something that, at this point in time -- now *Levy* didn't
2 involve a phone.

3 MR. HARRINGTON: Right.

4 THE COURT: It involved a notebook found inside a
5 guy's luggage.

6 MR. HARRINGTON: Yes.

7 THE COURT: They took the notebook, they made
8 pictures of it, but that's similar to what happened here,
9 right? There was pictures taken from images on the phone.

10 MR. HARRINGTON: But --

11 THE COURT: Does that somehow --

12 MR. HARRINGTON: The difference is, that *Riley* has
13 recognized the privacy interest in the phone. And I don't
14 know of any --

15 THE COURT: A strong privacy interest.

16 MR. HARRINGTON: Right. I don't know of any cases
17 that say you have privacy interest in a notebook that you're
18 carrying with your luggage when you come into the border. So,
19 I think that the fact that it's a phone and a strong privacy
20 interest helped to take it out of the scope of *Levy*.

21 THE COURT: Well, there could be two things, kind of,
22 at work here. There's *Cano*, right, which, for lack of a
23 better term, basically said this isn't a border search, right?
24 This is a search for criminal activity beyond anything to do
25 with the border, right? Then, there's the issue of, okay, if

1 that doesn't apply, but it's a -- taking *Riley*, that it
2 involves a phone, that raises the level. So, instead of
3 having no suspicion, you have to have at least reasonable
4 suspicion, right?

5 So, I -- *Levy* seems to address the -- there wasn't a
6 border search issue, right, by saying, they rejected that
7 argument, right? CBP officers can look for anything, even if
8 it's at the behest of the DEA or somebody else. But then,
9 some would say, as the Second Circuit is, they didn't decide
10 the issue of does it -- does this type of search -- the search
11 that was at issue in *Levy*, did that raise the level that you
12 had to show? You had to show some reasonable suspicion. They
13 said there was reasonable suspicion. So, we don't really have
14 to decide if you have to are not, right?

15 So, your argument, I guess, is twofold; one can follow
16 *Cano* and say this is beyond the scope of a border search. I
17 think *Levy* gives you some problems there. But then you have
18 this issue about does it raise the level to reasonable
19 suspicion, and was there reasonable suspicion? Mr. Tripi says
20 there was reasonable suspicion. So even if we raise that
21 level, it's okay.

22 MR. HARRINGTON: Well, the problem with his argument
23 about reasonable suspicion is, reasonable suspicion in the
24 mind of whom, right? And the record that you have doesn't
25 show that.

1 THE COURT: Well, I don't recall any information at
2 the hearing being brought out about reasonable suspicion.

3 MR. HARRINGTON: Neither do I. That's why I'm saying
4 the record --

5 THE COURT: Nobody got on the stand and says, here's
6 why we had reasonable suspicion, right? It was all about
7 whether or not this is was a basic search or some kind of
8 advanced search.

9 MR. HARRINGTON: Right. And I mean, again, it goes
10 to that transnational organized crime. I mean, we don't know
11 what that means. There's no proof in the record of what that
12 means. And so, that's the only thing that gives any kind of a
13 rise to reasonable suspicion, but I don't think that that
14 makes it, given the record.

15 THE COURT: He listed about seven things in his brief
16 as to why there was reasonable suspicion beyond the
17 transnational. Transnational was kind of thrown in there, I
18 think, along with the Dominican Republic is a drug source
19 country.

20 MR. HARRINGTON: But, Judge, the problem we've got
21 is, those things weren't proven in the record. I mean, you
22 can't get -- that may -- even if it's true, you have to put
23 some proof in the record for you in order for you to make that
24 finding. He can't just say it in his brief; otherwise, he's a
25 witness.

1 Judge -- and then, the next question, of course, is,
2 what's the consequence of what they did? And we have a
3 situation here where those -- what they got from this search
4 was used in the questioning of Mr. Bongiovanni at his house.

5 THE COURT: It was used in a bunch of different
6 things, right; affidavits for search warrants, questioning of
7 Mr. Bongiovanni, and we discussed that when we had the
8 hearing, that we might have to return to that depending on
9 how --

10 MR. HARRINGTON: Right.

11 THE COURT: If I were to deny the motion to suppress
12 and Judge Sinatra were to agree with me, I think a lot of that
13 stuff goes by the wayside. If Judge Sinatra ultimately
14 decides it should be suppressed, then we're going to have to
15 go back and figure out what's in and what's out, right, based
16 on that.

17 MR. HARRINGTON: We also have use of that, Judge, in
18 a number of search warrants that were found.

19 THE COURT: Yes.

20 MR. HARRINGTON: The search warrants contain many
21 other things besides just these phones, but we don't have
22 access to the search warrant affidavits.

23 THE COURT: And the Court would then have to go back
24 and --

25 MR. HARRINGTON: Right.

1 THE COURT: -- take that out and then figure out
2 whether there was still probable cause.

3 MR. HARRINGTON: So, other than any other questions
4 you have, Judge, I think that lays out what the issues are.

5 THE COURT: Okay. Mr. Tripi?

6 MR. TRIPI: Judge, I'll be happy to answer any
7 questions that you have for me, but we've divided up the
8 arguments and Mr. Dickson is going to handle them.

9 THE COURT: Okay, Mr. Dickson.

10 MR. DICKSON: May I go to the podium, Judge?

11 THE COURT: You can sit down, stand up, I draw the
12 line at laying down.

13 MR. DICKSON: Ready?

14 THE COURT: Yes.

15 MR. DICKSON: Your Honor, the government's position
16 is that the defendant's motion to suppress should be denied
17 for three reasons.

18 The first reason, as we laid out in our briefing, is that
19 this search of the defendant's cell phone was consistent with
20 well-established precedent that routine searches of a person's
21 property at the border do not require a warrant, probable
22 cause, or reasonable suspicion. Just because the piece of
23 property at issue was a cell phone in this case does not
24 change that calculus under any Supreme Court precedent, any
25 Second Circuit precedent, or any precedent other than that

1 from the Ninth Circuit.

2 THE COURT: You don't think that the *Riley* case --
3 you don't think that ups the ante on this?

4 MR. DICKSON: Your Honor, I think *Riley* did establish
5 that a person's privacy interest in their cell phone is maybe
6 heightened compared to other pieces of property, but I think
7 importantly, in this context, we are starting from a different
8 place than the court was starting at in *Riley*. The court in
9 *Ramsey* and in *Montoya de Hernandez* said that the crux of any
10 Fourth Amendment analysis is a balancing test between the
11 government's interest and law enforcement on one side, and a
12 person's privacy interest on the other side.

13 But in the border search context, the Supreme Court has
14 said that the government's interest in law enforcement is
15 fundamentally different than the government's interest within
16 the United States, which was the situation in *Riley*. The
17 situation in *Riley* was a search incident to arrest from
18 *Shamel*. And, in that case, the balancing interest is just
19 different here. So, even if we talk about *Riley* in a
20 heightened --

21 THE COURT: And this is a border search because it
22 happened at the border?

23 MR. DICKSON: That's correct, Your Honor.

24 THE COURT: And nothing whatsoever to do with finding
25 contraband or anything having to do with international travel

1 or anything like that? This was basically trying to take
2 advantage of the fact that the defendant was at the border to
3 conduct a search of his phone when you wouldn't have been able
4 to do it otherwise, right? That's really what happened here,
5 right? The government was trying to take advantage of the
6 situation?

7 MR. DICKSON: Your Honor, I don't think the
8 government was trying to take advantage of the situation, but
9 what I will say is that --

10 THE COURT: Well, then, what were they doing? Were
11 they concerned about whether or not he was smuggling drugs
12 into the country or child pornography in the country?

13 MR. DICKSON: Certainly not --

14 THE COURT: It really didn't have anything to do with
15 that, right?

16 MR. DICKSON: Certainly not child pornography, Your
17 Honor. The defendant is charged with a conspiracy to
18 distribute narcotics here, but what I will say, as to the
19 issue of --

20 THE COURT: You're kind of going what happened
21 afterwards to what happened then.

22 MR. DICKSON: Yes, Your Honor.

23 THE COURT: At that point, you had no information he
24 was involved with international drug trafficking.

25 MR. DICKSON: As I think the government laid out in

1 its brief, Your Honor, there was some information available
2 to --

3 THE COURT: Well, we'll go through that. Why don't
4 we go through that now.

5 MR. DICKSON: Well, Judge, if I could just say, as it
6 relates to -- I think your concern that you're bringing up is
7 about *Cano* from the Ninth Circuit, if I'm understanding you
8 correctly. I think that *Cano* created this dichotomy --

9 THE COURT: It wasn't just *Cano*. There was a Fourth
10 Circuit case.

11 MR. DICKSON: Well, *Cano* created the dichotomy
12 between searching for contraband and searching for evidence of
13 other crimes. That dichotomy, I don't believe, has been
14 adopted by any other circuit.

15 And, in fact, in the Supreme Court's decision in a case
16 called *Warden v. Hayden*, which is at 387 US 294, the thing the
17 Supreme Court clarified, the reason that *Cano*'s dichotomy here
18 is unworkable between contraband and evidence of other crimes
19 because the Supreme Court said in that case that privacy is
20 disturbed no more by a search directed to purely evidentiary
21 object than it is by a search directed to an instrumentality,
22 fruit, or contraband.

23 And when we're talking about the Fourth Amendment context,
24 that's what we're talking about; the balance between the
25 government's interest in law enforcement and the individual's

1 interest in privacy. And that balance doesn't shift, in any
2 way, shape, or form, regardless of whether the search was
3 directed at contraband or directed at some other kind of
4 evidence.

5 THE COURT: Well, *Cano* relied on the CBP duties in
6 the statute, right?

7 MR. DICKSON: Yes.

8 THE COURT: I believe I rejected that --

9 MR. DICKSON: Yes.

10 THE COURT: -- as to why it wasn't a border search
11 so-to-speak?

12 MR. DICKSON: Yes, Your Honor --

13 THE COURT: I'll go back to what the government did
14 here. I'm not trying to trick you -- is you tried to take
15 advantage of the fact that he was crossing the border. You
16 really didn't have any border reasons to search the phone. It
17 was really just, we're going to take advantage of this, try to
18 get evidence on his phone so we can try to go after him up
19 here for other crimes that he's committed up here.

20 MR. DICKSON: Yes, Your Honor. We're not disputing
21 that Mr. Bongiovanni was targeted for a search here, that
22 there was a look-out.

23 THE COURT: And it had no reason whatsoever to do
24 with him traveling back and forth across the border, right?

25 MR. DICKSON: Well, yes, Your Honor. I think that

1 that's right although --

2 THE COURT: Yes, what? Yes, I'm right?

3 MR. DICKSON: Yes, I believe you're right, Your Honor
4 although, again, I would say that there is information as
5 we've outlined in our brief that was available at that time
6 that the defendant --

7 THE COURT: Okay. Let's go through that.

8 MR. DICKSON: Okay. One --

9 THE COURT: One. The defendant has been under
10 investigation since July 20th of 2018 which was continuing,
11 expanding, and involved multiple federal agencies. So,
12 there's reasonable suspicion to believe he might be --
13 criminal activities we're investigating.

14 MR. DICKSON: Yes, Your Honor. I think that that's
15 part of it, right? The --

16 THE COURT: That can't be the sole thing.

17 MR. DICKSON: Sure. I had that HSI believed --

18 THE COURT: Number two, that there was information
19 that defendant had provided law enforcement sensitive
20 information -- law enforcement sensitive information to non-
21 law enforcement individuals engaged in drug trafficking.
22 Okay. When did you know that, and who knew it, and how did
23 they know it?

24 MR. DICKSON: I can't give you a date, Your Honor.

25 THE COURT: Isn't that critical to my analysis?

1 MR. TRIPI: Judge --

2 THE COURT: You're telling me there's reasonable
3 suspicion. You're listing these seven or eight things. We
4 didn't have any evidence produced of that. Some of them are
5 just generally open-ended things here.

6 MR. TRIPI: Your Honor --

7 THE COURT: No, Mr. Tripi. Sit down. You wanted
8 this gentleman to argue, so he's arguing. Have a seat,
9 please.

10 MR. TRIPI: Those were --

11 THE COURT: Have a seat, please.

12 MR. TRIPI: That was my --

13 THE COURT: Have a seat, please.

14 MR. TRIPI: You're asking about --

15 THE COURT: Have a seat please. Go ahead.

16 MR. DICKSON: Yes, Your Honor. I will say that in
17 this file, we do outline that while we don't have specific
18 dates for each of these pieces of information, I'd agree with
19 you on that, we do --

20 THE COURT: Okay. Let's go to number three. The
21 defendant was closely associated with the co-defendant Peter
22 Gerace.

23 MR. DICKSON: I'm sorry, Your Honor, could you repeat
24 yourself please?

25 THE COURT: Yes. Number three. The defendant was

1 closely associated with the co-defendant, Peter Gerace.

2 MR. DICKSON: Yes, Your Honor. Each of these pieces
3 of information that we've outlined here, as we've said in our
4 filing, was known to law enforcement --

5 THE COURT: How?

6 MR. DICKSON: -- by the -- through the course of the
7 investigation, Your Honor.

8 THE COURT: So, this goes back to the number one,
9 you're conducting an investigation?

10 MR. DICKSON: Right.

11 THE COURT: When was that known?

12 MR. DICKSON: Again, I don't have a specific date for
13 you, Your Honor.

14 THE COURT: Isn't that -- if it's not known until
15 after you got the phone, you couldn't have used it as
16 justification to get the phone, right?

17 MR. DICKSON: Your Honor, as we say in our filing, at
18 a minimum, by the time the defendant crossed the border on
19 April 23rd, the investigation indicated, among other things,
20 at least the following. So, prior to --

21 THE COURT: And I'm -- I should take the government's
22 word for that?

23 MR. DICKSON: As officers of the Court, Your Honor,
24 we're making that representation to the Court. Yes. We
25 did --

1 THE COURT: With no hearing, with no ability to
2 cross-examine any witnesses or for me to question any witness,
3 we should just take the government's word you had reasonable
4 suspicion before you seized the phone?

5 MR. DICKSON: We have made that representation to the
6 Court, Your Honor. The witnesses were called. I think
7 Special Agent Ryan --

8 THE COURT: If we have a case where somebody thought
9 somebody was out on the street corner and had a gun and the
10 police officer walked up to him, patted him down and found the
11 gun, and then we have a suppression hearing, right, you think
12 it would be enough just to say there was reasonable suspicion
13 to believe he had a gun without an evidentiary hearing?

14 MR. DICKSON: I'm not sure about in that context,
15 Your Honor, but I do think, again, as officers of the court,
16 we've made these representations. The agents were -- or one
17 of the agents, at least, was called to testify in this -- in
18 that evidentiary hearing --

19 THE COURT: He didn't testify about having reasonable
20 suspicion.

21 MR. DICKSON: I think he did testify that he had been
22 investigating Mr. Bongiovanni prior to the border search of
23 his phone.

24 THE COURT: Then I would expect your brief to have
25 this all laid out for me, right? On this page of this

1 transcript, here's where he said this.

2 MR. DICKSON: Understood.

3 THE COURT: That's not here.

4 MR. DICKSON: That's not. That's correct.

5 THE COURT: As a matter of fact, the only reference
6 is to another document in the file which basically said the
7 same exact thing on this topic.

8 MR. DICKSON: Yes, Your Honor.

9 THE COURT: Okay. Number four, that the defendant
10 submitted Drug Enforcement Administration memo containing
11 false statements about his relationship with his co-defendant
12 and related issues to DEA memos he submitted in November 2018,
13 December 2018, and January 2019.

14 MR. DICKSON: Yes, Your Honor. And, again, it's the
15 same. All this information, again, we've made representations
16 that all of that information was known to law enforcement
17 prior to the border search, that the indictment also does
18 provide more specifications onto those dates as to some of
19 those false memos that were written by the defendant, or
20 allegedly written by the defendant, and those dates precede
21 the border search of his phone. I think critically here, Your
22 Honor, the -- unless --

23 THE COURT: Have I seen these memos? Were these
24 memos at the hearing?

25 MR. DICKSON: The memos, I don't -- no, were not at

1 the hearing, Judge.

2 THE COURT: Number five. The defendant made false
3 and misleading statements to other members of law enforcement
4 regarding the relationship of his co-defendant and others.
5 Where did that happen?

6 MR. DICKSON: Just a moment, Your Honor. As is
7 alleged in Count 17, Your Honor, it's on or about March 29th,
8 2019. There were false statements made by the defendant about
9 his relationship with his co-defendant Peter Gerace.

10 THE COURT: That doesn't say anything more than
11 what's in this paper, right? But I guess the Grand Jury found
12 that.

13 MR. DICKSON: Correct, Your Honor.

14 THE COURT: Right? The DEA and -- I'm sorry -- that
15 the defendant retired from the DEA and retirement appeared to
16 occur abruptly after the defendant knew he was under some type
17 of investigation. Okay. When and how did the defendant know
18 he was under investigation?

19 MR. DICKSON: I believe that the defendant, at least
20 initially, knew he was under investigation because there was
21 an OPR investigation opened to him that preceded the border
22 search of the phone. And then again, Your Honor, by at least
23 March 29th, the defendant had been questioned by law
24 enforcement which, again, also precedes the border search of
25 the phone.

1 THE COURT: Well, I guess, preceded his retirement.

2 MR. DICKSON: That date didn't precede his
3 retirement, Your Honor. The retirement, I believe, was
4 February 2nd of that year.

5 THE COURT: And the Federal Grand Jury had commenced
6 the investigation into the defendant and others. When did the
7 Grand Jury investigation start?

8 MR. DICKSON: Let me ask Mr. Tripi, if I may, Judge.
9 We believe that it was approximately March 7th of 2019, Your
10 Honor, when the first witness testified.

11 THE COURT: Of 20?

12 MR. DICKSON: Of 2019.

13 THE COURT: Nineteen. And then the defendant made
14 false statements regarding, among other things, his
15 relationship with his co-defendant during an interview with
16 the Department of Justice Office of Inspector General agents
17 on March 29th, 2019.

18 MR. DICKSON: Yes, Your Honor; again, preceding the
19 border search at issue here.

20 THE COURT: What were the statements and how do we
21 know that they were -- how did you know they were false at
22 that time?

23 MR. DICKSON: The statements, as alleged in the
24 indictment, from that particular interview, Your Honor, were
25 the defendant denied ever witnessing Peter Gerace consume

1 narcotics, that the defendant denied that Peter Gerace ever
2 called him while a staff member or customer was actively
3 overdosing at the gentlemen's club operated by Peter Gerace,
4 and that the defendant denied ever initiating contact with
5 Peter Gerace, Jr., and then those were the three statements
6 that are alleged in the indictment, Your Honor.

7 THE COURT: We know those were false why?

8 MR. DICKSON: That's what the Grand Jury found
9 through the course of the investigation, Your Honor.

10 THE COURT: Well, the Grand Jury didn't return an
11 indictment until after this happened, right?

12 MR. DICKSON: That's correct, Your Honor.

13 THE COURT: So how do I know when the Grand Jury
14 decided that?

15 MR. DICKSON: The Grand Jury decided this issue after
16 the border search. The Grand Jury indicted after the border
17 search.

18 THE COURT: Then they throw in, additionally,
19 defendant was traveling back to the United States from the
20 Dominican Republic, which is a source country for narcotics.

21 MR. DICKSON: Your Honor, again, as officers of the
22 court, we made that representation and I fully understand
23 that, at least I don't recall any testimony, of that being
24 presented at the evidentiary hearing but, again, the witnesses
25 were --

1 THE COURT: I just don't recall having the officers
2 of the court argument made to me on evidentiary issues. Well,
3 that's what we said, so that's true, and I should take it as
4 true.

5 MR. DICKSON: I understand, Your Honor, the concern.
6 I do think, as officers of the court, there are times where
7 proffers are appropriate, and I think that we've proffered
8 these facts to the Court. The witnesses were available to be
9 cross-examined if the defense didn't agree with those proffers
10 of evidence here, but I do think that this is a supplementary
11 issue to the immediate issue, which is whether or not the
12 border search itself was routine or not.

13 THE COURT: I think you're up against it there a
14 little bit though, aren't you? You think this was a routine?
15 The thing that happened here was routine?

16 MR. DICKSON: I do, Your Honor.

17 THE COURT: They looked at his phone. They made
18 copies of what was in the phone. That doesn't raise the
19 level?

20 MR. DICKSON: Your Honor --

21 THE COURT: That, at least, raises the question.

22 MR. DICKSON: Certainly --

23 THE COURT: Certainly in *Levy* where they took
24 pictures of a notebook, the Second Circuit said, well, there's
25 an argument to be made that this raised the level, and you

1 have to show reasonable suspicion. They didn't have to decide
2 that because they said there was reasonable suspicion. And
3 you don't think then with *Riley* and everything else, you don't
4 think that looking at the guy's phone, taking pictures of the
5 information on the phone doesn't raise the level at that
6 point? That's what you're arguing?

7 MR. DICKSON: Your Honor, if the defendant's phone
8 had been hooked up to equipment and then otherwise --

9 THE COURT: They tried, they just were unsuccessful.

10 MR. DICKSON: They did, but because it was
11 unsuccessful, that's just not an issue before the Court
12 right --

13 THE COURT: And you think that's -- you only get that
14 higher level of scrutiny by you have to hook it up to a
15 machine? You can go through, look through it, take pictures
16 of anything that's in it, but right now, what's ever in it,
17 and you're good to do? That's what your position is?

18 MR. TRIPI: It's not anything in the phone, Your
19 Honor. The facts at issue in this case only are that Officer
20 Carter clicked on the text message application and the
21 contacts list application. He testified that he did not --

22 THE COURT: So if you only look at those two things,
23 you're good to go? If you make copies of those, you're good
24 to go, it's a basic search, no additional Fourth Amendment
25 protection?

1 MR. DICKSON: Your Honor, this isn't simply the
2 government here making this representation. The First Circuit
3 in *Alasaad*, which was decided in --

4 THE COURT: Is that specifically text messages and
5 contact information?

6 MR. DICKSON: I don't think it was specifically text
7 message and contacts information. I don't think the circuit
8 went into that because it was a civil suit brought by a class
9 of plaintiffs, but the First Circuit in *Alasaad* did equate a
10 basic search, as defined by CBP, which is what Officer Carter
11 testified here, to a routine search as defined by the Supreme
12 Court in *Montoya*.

13 THE COURT: What was the nature of the search in that
14 case?

15 MR. TRIPI: In *Alasaad*?

16 THE COURT: Yeah. They did the same thing, open up
17 the phone, and took pictures and everything else?

18 MR. DICKSON: Let me look back, Your Honor. I don't
19 think that the court went into -- yeah. The court didn't go
20 into detail into the facts of each specific one because I
21 think there were 10 plaintiffs who, as a class, were suing the
22 Department of Homeland Security there. So, I can't tell you
23 whether or not there were pictures or anything taken of each
24 of the ten plaintiffs' phones, but what I can tell you is that
25 the circuit court did say that a basic search, the same search

1 that was done here, equates to a routine --

2 THE COURT: How do I know if it was the same search
3 that was done here? You said you don't know the degree of the
4 search that was done in that case.

5 MR. DICKSON: That's why --

6 THE COURT: How do I know that the same search was
7 done here?

8 MR. DICKSON: I'm guessing --

9 THE COURT: I know they describe the basic search is
10 when you can look at the phone, right? You can look at the
11 phone and see if it had a razor blade in it. You can look at
12 the phone to see it might be made of plastic explosives or
13 something like that, the phone itself. But this search went
14 beyond that, right? This search went into the phone to get
15 the contents of what was in the phone.

16 MR. DICKSON: Respectfully, Your Honor, *Cano* also
17 said that a search of the phone, meaning a manual inspection
18 of the phone, a basic inspection, could be done under the
19 Fourth Amendment. *Cano's* holding differs from other
20 circuits --

21 THE COURT: What was the search in *Cano*? What was it
22 they didn't want searched in *Cano*?

23 MR. DICKSON: The issue in *Cano* was that there was
24 several steps to the search. The cell phone was searched
25 manually. It was scrolled through. The Ninth Circuit said

1 that was okay. That was a --

2 THE COURT: That's what *Levy* said, right?

3 MR. DICKSON: Right.

4 THE COURT: If you look at the notebook and you just
5 flip through it, that's fine, right?

6 MR. DICKSON: Yes. And then beyond that, *Cano*'s
7 holding, which is where I think it differs from some of the
8 rationale or decisions that other courts have made, is that
9 *Cano* said then if you take a picture of the evidence that you
10 find, then that requires reasonable suspicion. That raises
11 the issue. And respectfully -- and I --

12 THE COURT: That's not what happened here.

13 MR. DICKSON: It is what happened here.

14 THE COURT: Okay.

15 MR. DICKSON: Respectfully, Your Honor, though, I
16 think --

17 THE COURT: That *Cano* is wrong?

18 MR. DICKSON: *Cano* is wrong. And *Cano*, I think,
19 works in a number of different contexts against the weight of
20 authority from other circuits and from this circuit in
21 certain --

22 THE COURT: What case in this circuit?

23 MR. DICKSON: Not in that particular context, but in
24 the other context --

25 THE COURT: Well, in this context, what does the

1 Second Circuit say?

2 MR. DICKSON: The Second Circuit has many thoughts on
3 this issue --

4 THE COURT: They had *Levy*, right? *Levy* seemed to
5 intimate without deciding that when you got into this,
6 somebody's notebook, and you took pictures of it there, it
7 probably was a heightened interest of privacy, right?

8 MR. DICKSON: I don't think that *Levy* ever decided
9 that issue, Your Honor.

10 THE COURT: No, they don't.

11 MR. DICKSON: And again, I think that -- just give me
12 just a second.

13 THE COURT: Because here's where I view you're at,
14 okay? This was a search beyond a basic search, as far as I
15 can tell. Then you had to show reasonable suspicion, even
16 under *Levy*. *Levy* doesn't necessarily, I don't think, help you
17 with that. What was the reasonable suspicion? Then, we go
18 back to these seven things that you listed in that, which we
19 didn't have an evidentiary hearing on. There's no evidence
20 presented at the evidentiary hearing we did have, right?

21 MR. DICKSON: May I confer with counsel?

22 MR. TRIPI: Judge, I apologize for interrupting
23 earlier.

24 (An off-the-record discussion was held.)

25 MR. DICKSON: I apologize, Judge. Did you have a

1 question for me to answer or would you like me just to
2 continue my argument?

3 THE COURT: Just continue.

4 MR. DICKSON: Okay. Your Honor, the posture under
5 which we were operating at the time that we made those
6 representations to the Court about what reasonable suspicion
7 was, was that it was the government's belief that the weight
8 of authority in this context was that the search of the
9 defendant's phone was routine as defined by the Supreme Court;
10 that because it was a basic search, as Officer Carter
11 testified to, in every way, shape and form, that that meant
12 that it was routine.

13 THE COURT: So you're putting all your eggs in one
14 basket, right, that it was a basic search; therefore, we
15 didn't have to show reasonable suspicion?

16 MR. DICKSON: It was a basic search, Judge. That
17 much is clear. The question is --

18 THE COURT: I guess I'm not sure that it is clear.

19 MR. DICKSON: Respectfully, Judge, the language at
20 issue, I think, is routine versus non-routine. Basic and
21 forensic are terms that CBP uses. And as --

22 THE COURT: Well, what terms did the courts use?
23 Don't they use routine and not routine?

24 MR. DICKSON: Routine and non-routine.

25 THE COURT: And you're saying this was routine?

1 MR. DICKSON: Correct, Your Honor. Because *Alasaad*,
2 in a district court from Maryland, interpreting Fourth Circuit
3 decision in a case called *Saboonchi* said that basic searches
4 will never result in visualization of more than a fraction of
5 the data on the phone, and that agents use it in much the same
6 way a user does, that those searches --

7 THE COURT: As I said though, if you put your eggs in
8 that basket, I don't know if I go along with it was a -- what
9 were the terms you used?

10 MR. DICKSON: The Supreme Court has used routine
11 versus --

12 THE COURT: I'm not sure that it was routine search.
13 I think when you got into the phone and starting taking
14 pictures of stuff that was in the phone, I think that might
15 have raised to non-routine search.

16 MR. DICKSON: Understood, Your Honor. And
17 respectfully, I think that --

18 THE COURT: And then you don't have -- so then you've
19 got to show reasonable suspicion, right? You didn't do that
20 at the hearing because you put your eggs in one basket, we're
21 going to show the Judge that it was a routine search.

22 MR. DICKSON: Yes, Your Honor. And we're, of course,
23 happy, if the Court would be willing, to reopen the hearing to
24 put on that evidence --

25 THE COURT: Why didn't you do it in the first place?

1 That's what we had a hearing about.

2 MR. DICKSON: Understood. We thought that the weight
3 of authority from *Alasaad*, from *Saboonchi* interpreting *Ickes*
4 from the Fourth Circuit said that routine search -- excuse
5 me -- that basic searches as defined by CBP were equivalent to
6 routine searches as defined by the Supreme Court. And routine
7 searches consistently have been held to not require reasonable
8 suspicion.

9 THE COURT: You think that under *Riley* the Supreme
10 Court would say this was routine? You got in the phone, took
11 pictures of what was in the phone, that's routine, that's no
12 problem?

13 MR. DICKSON: I do, Your Honor, because *Riley* is, as
14 I had mentioned, a different posture than what we are talking
15 about here with the border search. The increased interest of
16 privacy that an individual has in their phone, I think that is
17 indisputable.

18 THE COURT: What if you wanted to do a strip search,
19 an anal cavity search?

20 MR. DICKSON: Those searches have been considered by
21 the Supreme Court in *Montoya de Hernandez* to be not routine.
22 Those types of searches require --

23 THE COURT: And only those types. You don't think
24 getting into somebody's phone and getting out all the
25 information they have in the phone that that's routine?

1 MR. DICKSON: If I can address that, Your Honor, the
2 Supreme Court has only found in one instance ever that a
3 search required -- at the border required heightened
4 suspicion. That was in *Montoya de Hernandez*, and that was
5 actually a seizure -- because of this whole length of the
6 seizure. In that case, the Supreme Court said that x-rays,
7 body cavity searches, and strip searches are the other types
8 of searches that are considered not routine. And the Eleventh
9 Circuit in --

10 THE COURT: They didn't say only.

11 MR. DICKSON: They didn't say only. They used
12 examples of that. The Eleventh Circuit, in a case called
13 *Touset*, which is a case that was dealing with cell phones,
14 took that question and addressed it. And the Eleventh
15 Circuit --

16 THE COURT: At the border?

17 MR. DICKSON: In a border search context --

18 THE COURT: Where they got into a phone and they took
19 pictures?

20 MR. DICKSON: They searched the defendant's -- this
21 is actually a forensic search. And the Eleventh Circuit has
22 said that there is no reasonable suspicion required to do even
23 a forensic search of a phone at the border. And the rationale
24 in *Touset* is that the Supreme Court --

25 THE COURT: Forensic search meaning hook it up to a

1 machine?

2 MR. DICKSON: Correct, Your Honor. Even that doesn't
3 require reasonable suspicion in the Eleventh Circuit.

4 THE COURT: You don't think in the Second Circuit in
5 the *Levy* case they didn't -- they weren't sure whether making
6 copies of pictures in a notebook would take it to the next
7 level? You think now they come back and say, well, even if
8 you hook it up to a machine and got all the information on it,
9 that wouldn't take it as far?

10 MR. DICKSON: I think the Eleventh Circuit's
11 rationale is sound. And if the Second Circuit were to
12 consider the Eleventh Circuit's rationale in *Touset* that they
13 may, in fact, find that. That's because *Touset* said, Your
14 Honor, that there is a difference when we're talking about a
15 person's bodily integrity versus a piece of a person's
16 property.

17 And, again, this was in the context of considering a
18 search of a cell phone. They said that it is a fundamentally
19 different exercise for law enforcement to do a strip search or
20 to do a body cavity search than it is to search a piece of
21 property. And they cited *Flores-Montano*, which is a Supreme
22 Court case, in which --

23 THE COURT: Was that before or after *Riley*, *Touset*?

24 MR. DICKSON: It was -- *Touset* was after *Riley*, I
25 believe. Yeah. *Touset* was after *Riley*. But the *Flores-*

1 *Montano* decision preceded *Riley*. But they did say -- the
2 Eleventh Circuit cited favorably to that to say that the
3 Supreme Court declined to differentiate between different
4 types of property that were at issue at the border, and that
5 SCOTUS -- the Supreme Court has only taken issue with that
6 prolonged seizure from *Montoya de Hernandez*.

7 I think that that's the critical piece here is that even
8 though there may be heightened privacy interests in a cell
9 phone post-*Riley*, the balancing that is the gravamen of any
10 Fourth Amendment inquiry is just fundamentally different at
11 the border than it is in a search incident to arrest within
12 the United States. The courts have been clear that the
13 government's interest in law enforcement is weighted
14 differently at the border and that's what this Court has to
15 decide. This Court has to decide --

16 THE COURT: So, under your theory, at the border,
17 they could take anybody's phone. They could look -- they
18 could get into the phone and they could start scroll --
19 whatever information they want out of the phone. You give up
20 any right you have to the privacy of your phone when you cross
21 the border?

22 MR. DICKSON: I don't think that it's any right
23 necessarily, Your Honor, but I think that in the context --

24 THE COURT: Well, what right is it?

25 MR. DICKSON: Well, the factual context that we're

1 dealing with here, again, is not a situation where any
2 encrypted files were accessed --

3 THE COURT: But only because you couldn't. Only
4 because you -- the machine didn't work, right? You were going
5 to do that, right? And apparently, in this Eleventh Circuit
6 case, they did that, right? They hooked it up to a machine?

7 MR. DICKSON: That's correct.

8 THE COURT: And they said, no. Not a violation. You
9 can hook anybody's phone up at the border to a machine. You
10 can take whatever information you want to off that phone
11 because you're at the border, right, and then use it later in
12 some kind of criminal proceeding.

13 MR. DICKSON: Because of the different balance of
14 privacy interests that are a reality at the border under --

15 THE COURT: That's what I'm asking. You don't have
16 any privacy interest in your phone at the border, right?

17 MR. DICKSON: The Eleventh Circuit said that there's
18 no reasonable suspicion required regardless of the type --

19 THE COURT: Right. So they can take anybody's phone,
20 they can hook it up to a machine, they can take all the
21 information off that phone, and use it for whatever purpose
22 they want because you have no privacy interest in it?

23 MR. DICKSON: In the Eleventh Circuit, yes, Your
24 Honor. But, again, we're not asking this Court to make that
25 finding here. The issue before this Court --

1 THE COURT: That's the case you're relying on to try
2 to get me to make the finding in this case. I'm just trying
3 to understand what you're saying. You're saying that the
4 Eleventh Circuit says there's no privacy interest whatsoever
5 in your phone at the border, right? That's what you're
6 relying on?

7 MR. DICKSON: I'm saying that the logic underlying
8 the Eleventh Circuit's opinion in *Touset* is, I think, relevant
9 in a critical aspect and that is that there is a significant
10 difference between a search of a person's body, the inside of
11 a person's body, compared to a cell phone, a computer, a piece
12 of luggage. There is a fundamental difference between that.

13 THE COURT: And the Eleventh Circuit case says
14 there's no privacy interest in your phone.

15 MR. DICKSON: The court does say that. And, again,
16 we're not asking the Court to make that finding here because
17 that finding wouldn't be pertinent in this case because no
18 forensic search was done. There was a very limited, basic,
19 cursory search of this defendant's phone done. But what our
20 position is, is that the search here was routine because --

21 THE COURT: What's your best case for this is
22 routine, getting into the phone, making copies of the
23 contacts, making copies of the text messages, that that's a
24 basic search or a routine search?

25 MR. DICKSON: I think *Alasaad* out of the First

1 Circuit is a good case for that, Your Honor. I also think
2 *Saboonchi*, which is a district court case out of Maryland.

3 THE COURT: The first one, isn't that the one we said
4 didn't know this --

5 MR. DICKSON: I don't know the facts of it.

6 THE COURT: Well then how can we say that that stands
7 for that proposition?

8 MR. DICKSON: It stands for the proposition that a
9 basic search, as defined by CBP, which is what Officer Carter
10 said was done here, a basic search, as defined by CBP, that
11 that is the equivalent to a routine search done at the border.
12 That's the proposition that *Alasaad* --

13 THE COURT: You're saying -- well, I'll have to go
14 back and look at the transcript. I don't remember. So,
15 clearly, him saying this was a basic search, like he was using
16 terms of art, he's just saying here's what he did.

17 MR. DICKSON: Your Honor, respectfully, he did use
18 terms of art. And I asked him to --

19 THE COURT: All right. Well, we'll check.

20 MR. DICKSON: And Mr. Tripi also asked Special Agent
21 Ryan to define those same terms, basic search versus advanced
22 search. There is reference to those terms in both.

23 THE COURT: What takes it from basic to not basic?

24 MR. DICKSON: The --

25 THE COURT: What's the difference?

1 MR. DICKSON: Under CBP policy -- and let me just get
2 it right for you here. So, CBP policy defines an advanced
3 search as any search in which an officer connects external
4 equipment through a wired or wireless connection to an
5 electronic device --

6 THE COURT: This is a basic search?

7 MR. DICKSON: An advanced search.

8 THE COURT: Oh, advanced.

9 MR. DICKSON: Yeah. In which an officer connects
10 external equipment through a wired or wireless connection to
11 an electronic device, not merely to gain access to the device,
12 but to review, copy, and/or analyze its contents. Advanced
13 searches require supervisory approval.

14 And then, CBP goes on to define a basic search as any non-
15 advanced search, so any search that's not conducted by
16 connecting a phone to equipment for the purpose of copying the
17 data within the phone. And as I think Officer Carter
18 testified to, and Special Agent Ryan testified to, there are
19 significant differences between those two types of searches.
20 Basic searches take 15 to 30 minutes. I think Officer Carter
21 testified that advanced searches take hours and hours. Basic
22 searches yield a fraction --

23 THE COURT: What's your best case for -- that a basic
24 search, as defined by CBP, which I guess I don't know CBP
25 necessarily sets what the legal -- from a Fourth Amendment

1 point, what's good and what's not good, but let's say that
2 they do. What's your best case that says that that definition
3 is the same as routine search?

4 MR. DICKSON: *Alasaad* out of the First Circuit.

5 And I agree with you, Your Honor, that CBP doesn't define
6 whether something is constitutionally enforced under the
7 Fourth Amendment. But *Alasaad* and *Saboonchi* out of the
8 district court in Maryland, which is 990 F. Supp. 2d 536, that
9 cited favorable a Fourth Circuit case called *Ickes*, which is
10 393 F.3d 501, that makes -- and *Saboonchi* said that *Ickes*
11 makes it clear that a routine border search may include a
12 conventional inspection of electronic media and a review of
13 the files on them, just as it may include physical papers.

14 So, those two cases --

15 THE COURT: What's the cite for that, say that again?

16 MR. DICKSON: *Saboonchi* cites *Ickes*, which is --

17 THE COURT: What does *Ickes* cite?

18 MR. DICKSON: I'm not sure what *Ickes* cites, Your
19 Honor. I don't have *Ickes* in front of me. I apologize.
20 Additionally, Your Honor, I will say that in *US v Young*, while
21 I don't know -- which is a case from this district in which
22 Judge McCarthy was writing for Judge Arcara, Judge McCarthy
23 did write that the agent in that case discovered a text
24 message after reviewing the cell phone. Now, it's unclear in
25 that decision whether a photo was taken or anything else, but

1 he did say he reviewed -- the agent reviewed a text message on
2 an individual's cell phone at the border and Judge McCarthy
3 said that the search of the electronics can be routine and
4 found that this particular search was a permissible routine
5 border search here.

6 The distinction between basic and advanced search, I
7 think, is critical to the Court's inquiry of whether or not
8 this search was routine or not routine as defined by the
9 Supreme Court. Officer Carter testified that the search was
10 15 minutes long, not hours long like an advanced search. It
11 yielded --

12 THE COURT: Let's get off this basic and advanced.
13 That's not what the case law is. The case law is routine and
14 non-routine.

15 MR. DICKSON: That's correct, Your Honor.

16 THE COURT: You want me to accept this CBP
17 interpretation of what's basic and advanced. I'm not sure
18 that I'm bound by that or anything is bound by that.

19 MR. DICKSON: I don't think you're bound by it at
20 all, Your Honor. I just think that the First Circuit and,
21 again, this district court in Maryland have found that that
22 definition is equivalent to routine, as defined by the Supreme
23 Court. And when a search is routine, there is no --

24 THE COURT: Let's assume you're wrong and it's not
25 routine. Where are we then with your case?

1 MR. DICKSON: If the search is non-routine, then
2 there is a circuit split. The Eleventh Circuit says no
3 reasonable suspicion is required. There are other circuits, I
4 think the First Circuit and Fourth Circuit, that say --

5 THE COURT: I think that goes back to, the Eleventh
6 Circuit says anything goes.

7 MR. DICKSON: Right.

8 THE COURT: You give up any right you have to privacy
9 in your phone when you cross the border. Government can take
10 it and look at it, make copies of it, they can do whatever he
11 want.

12 MR. DICKSON: Right. So, the Eleventh Circuit
13 says --

14 THE COURT: You can do whatever you want.

15 MR. DICKSON: You can do what you want. The First
16 Circuit and the Fourth Circuit say that reasonable suspicion
17 is required, and then the Ninth Circuit, which our position is
18 that that's an aberrational holding, goes a step further and
19 says you need to have reasonable suspicion that the phone
20 contains contraband. Those are the postures that we're in.
21 Our position though is --

22 THE COURT: Do whatever you want, reasonable
23 suspicion of criminal activity of any type, or Ninth Circuit,
24 only reasonable suspicion of contraband?

25 MR. DICKSON: Correct, Your Honor.

1 THE COURT: Okay.

2 MR. DICKSON: And I think *Irving*, which is a case out
3 of this circuit, and *Levy* as well, I think both stand for the
4 proposition contrary to what the defense has said, that
5 pretext just doesn't matter, that pretext doesn't define
6 whether or not the search is Constitutional.

7 THE COURT: In the sense *Levy* said that, right?

8 MR. DICKSON: Yes.

9 THE COURT: *Levy* wasn't -- said you're not bound by
10 looking for contraband.

11 MR. DICKSON: Right.

12 THE COURT: You can look for any type of criminal
13 activity?

14 MR. DICKSON: Yes, Your Honor, and that the pretext
15 just simply doesn't matter. And I think where that leads us
16 ultimately is the good faith doctrine here which, again, is
17 another basis that we believe should warrant denial of the
18 defendant's motion to suppress.

19 The Court -- as the Court knows, in *Julius*, which is a
20 Second Circuit case, the court said, exclusion of evidence
21 should be the last resort, not a first impulse. And *Julius*
22 was interpreting a Supreme Court case in which the court said
23 that in order for evidence to be suppressed, police conduct
24 has to be sufficiently deliberate, that exclusion can
25 meaningfully deter it, and sufficiently culpable that such

1 deterrence is worth the price paid by the judicial system.

2 In this context, the backdrop under which Officer Carter
3 was operating, and his watch commander were operating, they
4 understood, per their policy, that they were allowed to search
5 a person's cell phone at the border. They also understood
6 that the Second Circuit's decision in *Levy* and *Irving* say that
7 pretext doesn't -- that it doesn't change whether the search
8 is constitutional, doesn't change whether the search is
9 routine or not routine. It doesn't matter.

10 So, whether or not the defendant was targeted or not, and
11 those officers objectively -- it wouldn't change anything for
12 them. And they were operating under, I think, case law that
13 said routine searches at the border don't require reasonable
14 suspicion. And because of that, I think officers were in
15 objective reliance on -- appropriately objective reliance on
16 established case law to conduct this search.

17 And so, even if the Court were to find that this was not
18 routine or were unconstitutional for another reason, the good
19 faith exception should still apply.

20 THE COURT: Anything else?

21 MR. DICKSON: And we've also addressed the Doctrine
22 of Inevitable Discovery, Your Honor, in our filing and
23 specifically, that, as the Court knows, a search warrant was
24 ultimately executed on this phone. The phone was forensically
25 extracted, and so the contents of these photos that were taken

1 at the border would have inevitably been discovered per the
2 terms of that search warrant, too.

3 THE COURT: Well, there's no question you didn't have
4 probable cause at the time the border search was conducted,
5 right?

6 MR. DICKSON: That's right.

7 THE COURT: Right?

8 MR. DICKSON: That's right. No probable cause was
9 required.

10 THE COURT: Are you asking to have the hearing
11 reopened? Is that what you said?

12 MR. DICKSON: I'm saying that we don't think the
13 hearing needs to be re-opened because --

14 THE COURT: I get that a lot. We don't think we need
15 a hearing, Judge, unless you think we need it. Well, it's not
16 up to me to decide whether or not I need a hearing or not.
17 It's up to you. If you think you want to go with what you've
18 got or do you want to reopen the hearing? Why don't you sit
19 down and talk that over with Mr. Tripi?

20 MR. DICKSON: Sure. Thank you.

21 THE COURT: Mr. Harrington?

22 MR. HARRINGTON: Judge, I'd just like to comment on
23 the remarks with respect to good faith. I mean, I think that
24 it's kind of been cobbled together here. Normally with *Leon*,
25 you've got a -- the judge makes a decision in the search

1 warrant, and the officer follows it. That's not what we have
2 here. And, again, we don't have any knowledge of what these
3 officers are trained in or where their good faith comes from.
4 It may go toward the Court's consideration of the sanction
5 that these weren't cowboys or rogues or something else up
6 there. That may be a factor that they were following their
7 instructions or something, but I don't think that this is a
8 good faith exception. And --

9 THE COURT: You didn't -- you usually -- that, like
10 you say, *Leon* is in the context of, you issued a search
11 warrant, maybe the search warrant wasn't up to snuff, but you
12 relied on it in good faith. Here, we have no magistrate or
13 any type of judicial official review this or anything before
14 the search was done.

15 MR. HARRINGTON: Correct. And, Judge, with respect
16 to inevitable discovery, the sequence here is they got this
17 stuff from the phone, and they used that as part of their
18 application for search warrants, including of the phones. So,
19 the inevitable discovery apparently comes after this happened
20 while you're using this information. Now, maybe you will make
21 a decision there is enough in there that I would have given
22 them the phones anyway, but that's up to you to determine, but
23 this is not just a simple inevitable discovery case.

24 THE COURT: Is that it, Mr. Harrington?

25 MR. HARRINGTON: Yes.

1 THE COURT: Anything else from the government?

2 MR. DICKSON: Judge, we'd just say that we would ask
3 the Court to decide the issue as to whether or not this was
4 routine or non-routine, thus whether or not reasonable
5 suspicion was required --

6 THE COURT: Okay. So if I say it's non-routine,
7 you're going in the tank on reasonable suspicion.

8 MR. DICKSON: We'd ask that, Judge, to be able to
9 reopen the hearing at that time if that's what -- the Court's
10 decision.

11 THE COURT: You want me to go through all that drill
12 and then if I decide there wasn't, then we'll have -- then,
13 and only then, do you want a hearing?

14 MR. DICKSON: Your Honor, I think we're --

15 THE COURT: I don't understand why you didn't do it
16 the first time.

17 MR. DICKSON: Fully understand, Your Honor. I think
18 we were, as I said, in a different posture --

19 THE COURT: You put your eggs in one basket, that it
20 was going to be routine. I'm not sure that it is. And so,
21 you didn't bother with the reasonable suspicion.

22 MR. DICKSON: It wasn't that we didn't bother with
23 it, Your Honor, if --

24 THE COURT: You didn't do it. You didn't solicit any
25 evidence regarding that issue.

1 MR. DICKSON: That's right, Your Honor. So, I think
2 we would lean toward asking the Court to decide the issue but,
3 again, we could ask the Court for some indulgence to be able
4 to reopen the hearing if the Court decides that reasonable
5 suspicion was required.

6 THE COURT: So, what you really want is, you want me
7 to decide. And if I say it was non-routine, you're going to
8 appeal that to Judge Sinatra, see what he says, and then come
9 back and ask me for an evidentiary hearing?

10 MR. DICKSON: I'm not sure the order of operations
11 that would be appropriate, Judge, but I do think that we would
12 ask the Court for some leeway to reopen if the Court were to
13 make that finding.

14 THE COURT: Mr. Harrington, do you have a position on
15 the hearing?

16 MR. HARRINGTON: I do, Judge. I think you gave us an
17 opportunity. The case has gone on a long time. We had plenty
18 of time to do it, and the government made a tactical decision.
19 We often do. Sometimes, we win. Sometimes, we lose. I don't
20 think it's fair to Mr. Bongiovanni to allow a reopening of the
21 hearing.

22 THE COURT: What's your decision on, as officers of
23 the court, I should accept what they say about reasonable
24 suspicion?

25 MR. HARRINGTON: It's evidence, Judge. Mr. Tripi

1 didn't testify. Whoever wrote the brief didn't testify.
2 That's evidence. I can't come in and say things afterwards
3 and hear about Mr. Bongiovanni told me this, and -- you can't
4 do that. It's not evidence. I adamantly oppose that.

5 MR. TRIPI: Your Honor, if I may, as long as we're
6 talking logistics for one moment?

7 THE COURT: Sure.

8 MR. TRIPI: I think the issue with just agreeing to
9 reopen the hearing is that then you get into a panoply of
10 underlying information that the investigation was about,
11 information that they had, and that's a huge discovery device
12 for the defense. I get why they want to get to that point,
13 but then we're right back into a lot of stuff that's been --

14 THE COURT: Mr. Tripi, ultimately, the burden is on
15 you to prove that this search was good, right?

16 MR. TRIPI: We believe we've done that.

17 THE COURT: Then let's go with that.

18 MR. TRIPI: We believe we've done that but, at the
19 same time, we don't believe that any other court in this
20 context has found that reasonable suspicion was required. So
21 then, you get to the good faith and all of that. If you're
22 going to make that --

23 THE COURT: I don't know that you can say no other
24 court. I think the Ninth Circuit has decided --

25 MR. TRIPI: Other than *Cano*. Yes. That's a --

1 THE COURT: That's a court, right, the Ninth Circuit?

2 MR. TRIPI: We contend that's the outlier opinion.

3 Correct. But other than that, we think good faith --

4 THE COURT: And I thought the Fourth Circuit decided
5 that, too?

6 MR. TRIPI: *Cano* talked about digital contraband.

7 THE COURT: Yeah.

8 MR. TRIPI: Yeah. They were the outlier in the
9 regard. But I think even *Cano* -- I understand you're not --
10 don't love the argument, but even in the *Cano* decision, they
11 said manual searches are reasonable without inevitable
12 discovery.

13 THE COURT: I thought *US v Aigbekaen*.

14 MR. TRIPI: I'll defer to Mr. Dickson's argument on
15 that regard. But, Judge, again, if there is a suppression of
16 the information at the border, and we're not suggesting that
17 there should be, that's a limited amount of information.

18 THE COURT: Then we're going to have to go back and
19 get into how that all affected the search warrants --

20 MR. TRIPI: Right. And what you said at the prior
21 hearing is that, we might need to have a second hearing.

22 THE COURT: Yeah.

23 MR. TRIPI: Right. So what I'm saying is --

24 THE COURT: Well, we had a hearing on whether or not
25 the phone should be --

1 MR. TRIPI: But we're --

2 THE COURT: -- suppressed. That was that hearing.

3 The other hearing was going to be about if it is suppressed --

4 MR. TRIPI: Fruit of the poisonous tree --

5 THE COURT: -- what is actually happening. Okay.

6 MR. TRIPI: So the specter of a second hearing still
7 remains is my point.

8 THE COURT: Yeah, but it wouldn't be about whether or
9 not he showed reasonable suspicion to look at the phone.

10 MR. TRIPI: We don't want to waive our right to ask
11 you to reopen the hearing. That's where we're at, Judge.

12 THE COURT: You can ask anything. I can't stop you
13 from asking for anything, right?

14 MR. TRIPI: You can --

15 THE COURT: You're not asking now, right? You're
16 telling me you don't want one now.

17 MR. TRIPI: We're asking you to keep an open mind.
18 That's where we're at.

19 THE COURT: I always try to keep an open mind,
20 Mr. Tripi. Okay. Let's -- Mr. Harrington, why don't we just
21 try to finish off your issues?

22 MR. HARRINGTON: I thought you were going to do
23 Mr. Gerace's issue, the latest issue. That's what we told you
24 yesterday.

25 THE COURT: Okay. If you want to do that, that's

1 fine. Mr. LaTona, I think that means you're up.

2 MR. LATONA: Thank you very much, Your Honor. I'm
3 going to stand. If I sit too long, the back goes out, Judge.

4 Judge, regarding the defense Rule 6 application for the
5 disclosure of Grand Jury material, the thing I want to address
6 initially is, I was getting on a plane when we filed. I was
7 headed out to Las Vegas, and the government indicated they
8 felt that the second supplemental submission on that issue
9 should have been sealed. They then made a motion and got it
10 sealed.

11 And when I got back into town, we submitted a joint
12 defense submission requesting that Your Honor vacate that
13 sealing order basically predicated upon the proposition that,
14 in good faith, we prepared our submission. We feel strongly
15 that it fully complied with the order -- the protective order
16 under which we were allowed to look at redacted Grand Jury
17 materials.

18 As Your Honor knows, one of the matters that I put in,
19 that was put in that pleading, had to do with an unsworn
20 hearsay opinion from a retired strike force attorney which we
21 did not name that individual. So, that is --

22 THE COURT: Well I don't think you named anybody.

23 MR. LATONA: Pardon me?

24 THE COURT: You didn't use anybody's name.

25 MR. LATONA: True.

1 THE COURT: Except maybe with regard to the
2 defendant's ex-wife. Did you use her name in there?

3 MR. LATONA: Well, her name is all over the place
4 based on her mouthing off to the media and basically outing
5 herself. The only one I did not mention by name would be
6 Mr. Gerace's father because there was an allegation in there.
7 I didn't name him and whatnot, but we proceeded in good
8 faith and we --

9 THE COURT: Before we go any further --

10 MR. LATONA: Sure.

11 THE COURT: -- I want to make sure we're clear as to
12 what happened, okay? You made a finding, right?

13 MR. LATONA: Yes.

14 THE COURT: We got an email. Was I copied on the
15 email, Mr. Tripi?

16 MR. TRIPI: I believe chambers was copied and then I
17 followed up with a motion.

18 THE COURT: That should have been under seal. I made
19 the decision at that point to put it under seal before I got
20 any motion or anything like that just to preserve the issue,
21 okay? So I just want to make that clear on the record.
22 That's what happened. Then Mr. Tripi, I think, followed up
23 with a motion.

24 MR. TRIPI: I did.

25 THE COURT: Okay. I'm sorry.

1 MR. LATONA: That's true. And Judge, quite frankly,
2 once Your Honor made that ruling, we had two filings after
3 that that we put under seal to be consistent with Your
4 Honor's --

5 THE COURT: Sure. Sure.

6 MR. LATONA: We've been trying to comply from the
7 get-go and whatnot. So, that issue was up there, and I don't
8 know if Your Honor is going to decide it or whatever, but
9 clearly, Your Honor, our position is the material was
10 disclosed and it was used consistent with the protective
11 order.

12 I think, number two, our position is that the material,
13 the matters that we mentioned, and it was very circumspect,
14 and it only related to issues that we think can and should, at
15 some point, support a motion to dismiss this indictment. We
16 were very, very, circumspect. Our position is that material
17 should have been disclosed under the Brady doctrine and Your
18 Honor's Rule 5 order that is also in place in this particular
19 case. And I think we all know we've been in the system long
20 enough to --

21 THE COURT: Did you get the Grand Jury material?

22 MR. LATONA: Here's what happened, Judge. We were
23 afforded the opportunity to go to the United States Attorney's
24 Office. When we went there, there were redacted transcripts
25 that we were allowed to look at. We didn't get a copy of

1 anything, but we were left in a room. We were able to make --

2 THE COURT: Transcripts of the Grand Jury
3 proceedings?

4 MR. LATONA: Yes.

5 THE COURT: And they were redacted?

6 MR. LATONA: Yes.

7 THE COURT: Okay.

8 MR. LATONA: Yes. Yeah. Grand Jury witness
9 transcripts, witness testimony before the Grand Jury. That's
10 how it worked and that's what happened, Judge.

11 And, Your Honor, our motion -- originally, in our original
12 omnibus motion, I mean, we wanted full disclosure of
13 everything that Mr. Gerace's ex-wife said because she outed
14 herself as a Grand Jury witness and the whole world knows
15 about that. Anything else was strictly limited to evidence
16 with regard to Italian organized crime or the Mafia or La Cosa
17 Nostra and the instructions to the Grand Jury regarding that
18 evidence exclusively, not getting into other matters that may
19 well be somewhat relevant to the charges in this particular
20 case.

21 Judge -- and even in our pleadings, we have suggested an
22 alternative, and I think there's precedent for it in this
23 district. Judge Arcara did it in *Leeper*; Judge McCarthy in
24 *Koschtschuk*, and that is a directive of the government to
25 submit for Your Honor's in camera ex-parte review the Grand

1 Jury evidence and those instructions for Your Honor to be in a
2 position to make a decision what, if any, portion of that
3 should get disclosed to the defense.

4 Now, clearly, Judge, this is an issue in the Second
5 Circuit that won't go away. Some of the cases we've invited
6 Your Honor's attention to is *Jacobson*, a post-conviction
7 remand by the Second Circuit with a requirement that there be
8 full disclosure of Grand Jury evidence to the defense and then
9 an adversarial hearing.

10 The Second Circuit did it in *Osteppa* and went a step
11 beyond where it criticized improper use of hearsay. They
12 reversed it and dismissed the indictment. And the same thing
13 happened in the *Hogan* case; post-conviction reversal and
14 dismissal of the indictment so that this issue is here.

15 And quite frankly, Judge -- and I don't know -- I believe
16 you were with Judge Arcara, but when you look at the dismissal
17 order in *Leeper*, I mean, the conduct there was basically --
18 and the Judge said there's no bad faith. I think they were
19 just cutting corners. But in cutting the corners, the
20 defendant did not get the fair and unbiased review of the case
21 that he was entitled to.

22 And Judge McCarthy and Judge Skretny's dismissal of the
23 *Acquest*/Bill Huntress case. Basically, I think it's on all
24 fours here because the evidence that came in here was the
25 unsworn testimony of a retired strike force lawyer, that I'm

1 going to prosecute. That's the same thing as saying there's
2 probable cause, which was led to the reversal in the *Acquest*
3 case.

4 Now, Judge, and again, you know, being somewhat
5 circumspect, it is a document we filed yesterday. I don't
6 know the document number, 42522, but inviting Your Honor's
7 attention to pages 3 and 4, those are the matters, the hearsay
8 matters, that we submit were extremely prejudicial and we
9 submit that that should trigger an order of Your Honor
10 ultimately, maybe after you look at everything, but then we
11 get an opportunity to review it as well and, again, to just
12 limit it to that area where we feel our client was prejudiced
13 in the Grand Jury's activities.

14 THE COURT: And this is in regard to the Italian
15 organized crime area?

16 MR. LATONA: Well, it's more than that in the Grand
17 Jury. There's Mafia, La Cosa Nostra --

18 THE COURT: Okay. You're not asking for everything.

19 MR. LATONA: No, no. Just -- okay. IOC was a term
20 of art that was used in the indictment. I'm going to talk
21 about the striking that as well, but that's right. You're
22 right on the money. It's everything having to do with IOC,
23 Mafia, La Cosa Nostra, and what -- just that evidence which
24 Katrina, the ex-wife, was all over the place. She said it,
25 again, publically. There should be no limitation on the

1 disclosure of her Grand Jury testimony.

2 THE COURT: You don't say anything about hearsay.
3 Are you arguing that the -- there can't be hearsay in front of
4 the Grand Jury?

5 MR. LATONA: Not at all. And that's not what we're
6 saying. But what we are saying is that the hearsay came in in
7 a prejudicial matter. For instance -- well, let's talk about
8 that. They talk about the Mafia. There's no firsthand
9 evidence about the Mafia. They could -- I mean, none. None
10 whatsoever. La Cosa Nostra --

11 THE COURT: This is kind of -- this is in the same
12 vein as -- that it's prejudicial, inflammatory, that's what --

13 MR. LATONA: Exactly. But it's hearsay. When
14 somebody --

15 THE COURT: Why is hearsay negative? Because the
16 Rules of Evidence don't apply in front of the Grand Jury.

17 MR. LATONA: Well, they do. *Osteppa* -- when the
18 Second Circuit reversed and threw out the indictments, that
19 improper use of hearsay can result in a dismissal of the
20 indictment, that's *Osteppa*, a Second Circuit case.

21 THE COURT: I'll take a look at it.

22 MR. LATONA: Yeah. Yeah. That's right there on the
23 point. You know, the other hearsay, Mr. Gerace's father had a
24 position at Local 210 which was associated with the Mafia, La
25 Cosa Nostra. That's all hearsay and had nothing to do with

1 the case, nothing to do with the legitimate investigation of
2 Mr. Gerace. Pure poison.

3 There was a situation, again, where they talked about the
4 retired strike force attorney whose name I saw but there's no
5 reason to put that individual's name in here, and that this
6 retired agent talked to him and that the strike force attorney
7 supposedly opined, well, I'm going to prosecute Mr. Gerace.
8 That's the same thing as saying there's probable cause.

9 And the other thing that was in there that was heavily
10 redacted, Judge, is that this retired FBI guy said, well, I
11 originally wanted to flip Gerace because of his familiar
12 relationship with -- and then that was all redacted out there.
13 So, from what I can see, there was just poison in that
14 proceeding and we just want the full and fair opportunity to
15 litigate that issue, and we feel that we've made a very
16 compelling case. Most respectfully, Judge, we've got to
17 address this issue now.

18 THE COURT: I guess I -- let me just get -- help me
19 to get straight in my own mind. You want the Grand Jury
20 transcripts regarding this issue. I understand that part.
21 Then, this issue came up about sealing whatever it is that --
22 the motion that you made.

23 MR. LATONA: Right.

24 THE COURT: Now, you want -- are you arguing that
25 that should be unsealed? This is something you produced, the

1 motion.

2 MR. LATONA: Well, no. They started it. We've --
3 listen. Our -- here is our position.

4 THE COURT: Okay.

5 MR. LATONA: All right? There was a protective order
6 in place. Our access to this material is under the terms and
7 conditions of the protective order. Part of that order is
8 that nothing includes our use of the material we review as
9 long as we don't identify individuals. Our filing was
10 consistent with and in accordance with the protective order.

11 Coupled on top of that, it's our position under *Brady* the
12 disclosure had to be made. That's basically -- now, you --

13 THE COURT: And I did all that.

14 MR. LATONA: Okay.

15 THE COURT: Then there's this issue about the recent
16 filings, should they be sealed or not? I think Mr. Tripi was
17 saying that was a violation of the protective order. You're
18 saying it wasn't. I don't know right now whether it was or
19 wasn't, but do you have -- is there any big need for you to
20 have that out in the public right now?

21 MR. LATONA: No. No, Judge. I'm saying that's why
22 we were consistent with you on --

23 THE COURT: Right. Right.

24 MR. HARRINGTON: We wanted to go on record early just
25 to let you know, Judge, our position is that we didn't violate

1 the protective order, but everything filed since then, out of
2 respect and obedience to your order has been done under seal.

3 THE COURT: Now I got you. I got you. Okay.

4 Mr. Tripi?

5 MR. TRIPI: May I go -- I'm going to go in the same
6 order that Mr. LaTona did --

7 THE COURT: Okay.

8 MR. TRIPI: -- just to address each point, Judge.

9 Let me back up to how they came into possession of the
10 information that they filed publicly. For, I think, well over
11 a year now, maybe two years, in one of the discovery letters
12 that I produced early, I indicated to Mr. Harrington and other
13 prior counsel, Mr. Daniels at the time, that I would make
14 certain Grand Jury transcripts of law enforcement officers
15 available.

16 As we all know, we don't even have a trial date yet. I'm
17 under no obligation to do that, but I'm for attorneys being
18 prepared for cases. I have no problem with that. So, I made
19 that offer. Eventually, Mr. Harrington took me up on it
20 first, although he came to review the transcripts second in
21 time. And then, the firm HoganWillig had an attorney, along
22 with Mr. LaTona, come to my office.

23 I prepared the seven transcripts that I've outlined in
24 docket 274 with limited redactions. Certain names were
25 redacted, but the core of the substance of the testimony was

1 available for defense counsel's review. We had a discussion
2 that I was making this available under the terms of the
3 protective order, and the protective order precludes third-
4 party dissemination.

5 Now, at that point in time, in all candor, Judge, had
6 Mr. LaTona or anyone else said, hey, I'm going to write down
7 every word that you make available and essentially create a
8 transcript of the transcript, and then I'm going to file a
9 motion publicly putting out into the ether, without the names,
10 but substance of the Grand Jury proceedings, I would have
11 said, Mr. LaTona, have a good day. We'll see you and you'll
12 have these later on when we have a trial date.

13 And so, I operated under good faith. Maybe there was a
14 misunderstanding, but the stuff got filed publicly without a
15 phone call to me, without any hashing it out as to, hey, were
16 we on the same page here? None of that. I immediately fired
17 off the email that you were copied on and I called
18 Mr. Harrington and it was clear to me that Mr. Harrington
19 didn't make the filing, even though he signed onto it, and
20 Mr. LaTona was on an airplane.

21 I told Mr. Harrington I'm going to file the motion. He
22 was willing to do so because he was being a gentleman, but I
23 filed it. It shouldn't have been filed publicly, is my view.
24 I think I was careful to say whether it's real or perceived
25 violation of the protective order, the government certainly

1 felt taken advantage of in the moment, so we filed the motion
2 that we did.

3 THE COURT: I think we can cut to the chase.
4 Mr. LaTona isn't arguing right now that it necessarily needs
5 to be disposed of, right? That's what you just said.

6 MR. LATONA: That's correct, Judge.

7 THE COURT: Yeah. So, let's --

8 MR. TRIPI: I'll move on past that now, Judge.

9 As to their filing, the second supplemental, it's easy to
10 say in the reply, after having the opportunity to read our
11 response at docket 274, I wasn't really asking for everything.
12 They were. They were asking for instructions, and there was
13 no limitation in their docket -- their filing at docket 265 as
14 to what they wanted. They wanted soup-to-nuts instructions
15 and everything, 90 plus witnesses, and so, no. There was not
16 a limitation.

17 Then, in the reply, after probably looking at our filing,
18 understanding that they haven't met their burden -- see, it's
19 their burden to establish three things; first, that the
20 material sought is needed to avoid a possible injustice in
21 another judicial proceeding. They have not established that
22 whatsoever. We're going to have a trial. Judge Sinatra is
23 going to be the Judge. He's going to determine under Rule
24 401, 403 what comes in, what doesn't. An indictment is an
25 allegation. It's proof of nothing. That's settled law. So,

1 there's no injustice.

2 Second, that the need for disclosure outweighs the need
3 for continued secrecy. I footnote it in my filing, there is
4 still a need for secrecy here. In a footnote, I cite to
5 *Vondette*. There's related investigation. You're aware of the
6 breadth of the investigation from the search warrant
7 affidavits that you have seen. There have been related search
8 warrants related to this investigation as recently as November
9 and March or April of this year; so, November 2021 and then
10 again in March or April of this year.

11 And three, that the request is structured to cover only
12 what is needed. They did none of that. And I cited a
13 series of Supreme Court cases and district court cases, Second
14 Circuit case, and I quoted from *Petrol Stops*, which is a
15 Supreme Court case; *Douglas Oil v. Petrol Stops Northwest*, 441
16 US 211 at 222.

17 And the quote from that case is that, in considering the
18 effects of disclosure on Grand Jury proceedings, the courts
19 must consider not only the immediate effects upon a particular
20 Grand Jury, but also the possible effect upon the functioning
21 of future Grand Juries. Persons called upon to testify who
22 will consider the likelihood that their testimony may one day
23 be disclosed to outside parties, fear of the future
24 retribution, or social stigma, may act as a powerful deterrent
25 to those who would come forward and aid the Grand Jury in the

1 performance of its duties. So, you don't just look at this
2 case, necessarily. You look at the broad view, all Grand Jury
3 cases.

4 THE COURT: Now, though, he seems to be narrowing his
5 request where it's just regarding Grand Jury testimony
6 regarding Italian organized crime, or Mafia, or La Cosa
7 Nostra, or whatever you want to call it, but that's all he's
8 looking for.

9 MR. TRIPI: Right.

10 THE COURT: And I guess, as a starting point for
11 that, he starts with the indictment, right, which mentioned
12 Italian organized crime. So, obviously, there was something
13 mentioned to the Grand Jury about it, right, because they put
14 it in the indictment.

15 MR. TRIPI: Sure.

16 THE COURT: Right? And then, he's arguing that from
17 what he knows of the Grand Jury testimony, what he can see
18 that's not redacted and within and combined with what's in the
19 indictment, that there may be improperly prejudicial
20 information given to the Grand Jury regarding Italian
21 organized crime, Mafia, et cetera.

22 MR. TRIPI: Yeah. Understand the shifting argument.

23 THE COURT: I think that's where we are.

24 MR. TRIPI: Right. His shifting argument is the age-
25 old tactic of, let's ask for the world, and then we'll reduce

1 it to what we really want. So I'm --

2 THE COURT: I'm not going to characterize it one way
3 or the other.

4 MR. TRIPI: That's --

5 THE COURT: I think what he's asking for now, anyway,
6 is for this information. Why shouldn't he be able to get that
7 information if there was information put before the Grand Jury
8 regarding the defendants were involved in the Mafia, Italian
9 organized crime, La Cosa Nostra, whatever?

10 MR. TRIPI: Well, a couple of reasons. First, that
11 disclosure, if that was the standard of how you get to the
12 Grand Jury material, that would eviscerate the long-standing
13 presumption of regularity for the Grand Jury. That's the
14 starting point. This Grand Jury is presumed valid. This
15 indictment is presumed valid.

16 And then you look at, you know, what have they put forward
17 in terms of misconduct, right? And I hesitate to even use
18 that term because there was absolutely no misconduct in the
19 Grand Jury. The Grand Jury has broad investigatory powers,
20 right?

21 Just a plain reading of this indictment of conspiracy
22 between multiple individuals, you could see how reference to
23 Italian organized crime is relevant. You have a DEA agent
24 charged with, in multiple counts, of accepting bribes and
25 protecting individuals that includes his friends, associates,

1 and people he believed to be associated with Italian organized
2 crime. That goes right to the heart of what this indictment
3 is about. So, if you were to say, oh, well, there's a
4 reference to Italian organized crime in the indictment. They
5 say that's prejudicial. All relevant evidence, all evidence
6 is prejudicial. Any prosecutor will say that. That's the
7 law. What the courts are concerned with is, unduly
8 prejudicial or unfair prejudice. And that's defined by the
9 nature of the investigation.

10 This indictment has ten different federal statutes ranging
11 from client conspiracy, conspiracy to defraud the United
12 States, obstruction of justice, sex trafficking, maintaining a
13 drug-involved premises, narcotics conspiracy. A wide variety
14 of criminal activity was clearly within the scope of the Grand
15 Jury's investigation and I've cited a myriad of cases. Motive
16 is always relevant. And the indictment is very nuanced.

17 Nowhere in the indictment does it say, Mr. Bongiovanni is
18 Italian organized crime. Nowhere in the indictment does it
19 say Mr. Gerace is Italian organized crime. It focuses on the
20 motive and knowledge of the agent and how others held
21 themselves out to the agent.

22 THE COURT: How many reference are there in the
23 indictment to Italian organized crime?

24 MR. TRIPI: I didn't count them all. It's certainly
25 laid out --

1 THE COURT: I'm just asking because I was wondering
2 if I could just hear what --

3 MR. TRIPI: I'll give you one. I'll read one. Yes,
4 Judge. Quoting from page 2 of the second superseding
5 indictment, this would be under Count 1. Introduction. I'm
6 sorry, Judge, I'm going to go to Count 1, manner and means.
7 This is at page 5. This is as an example of how IOC is used.
8 Count 1 is the conspiracy which charges Mr. Bongiovanni and
9 previously before his guilty plea, charged Mr. Masecchia.

10 Paragraph 5. Manner and means. It was part of the
11 conspiracy that in exchange for payments he received, and in
12 order to ingratiate himself to individuals whom he believed
13 were members and associates of IOC, the defendant Bongiovanni
14 utilized his position as a DEA special agent to attempt to
15 dissuade other members of law enforcement from conducting
16 investigations of his coconspirators, friends, associates, and
17 individuals the defendant believed to be connected to or
18 associated with IOC, including Masecchia and others, and from
19 conducting investigations into any individuals who may have
20 been able to expose his criminal activities and those of his
21 friends, associates, and individuals the defendant believed to
22 be connected to or associated with IOC.

23 Count 2, that's the indictment -- the charge charging
24 Mr. Bongiovanni and Mr. Gerace has similar language as it
25 relates to the manner and means.

1 THE COURT: The one you read, is that the first
2 mention of IOC in the --

3 MR. TRIPI: No, it's the --

4 THE COURT: Can you just read quickly what the --

5 MR. TRIPI: The very first mention? I apologize,
6 Judge.

7 Paragraph 3 in the introduction reads as follows: The
8 defendant Bongiovanni had friends and associates who he knew
9 were involved in possession, use, distribution, and
10 importation of controlled substances. The defendant
11 Bongiovanni's friends and associates who were involved in the
12 possession, use and distribution, and importation of
13 controlled substance, included, among others, individuals he
14 believed to be members of, connected to, or associated with
15 the Italian organized crime in the Western District of New
16 York and elsewhere.

17 Now, in the overt acts later on, there's an overt act
18 where a fellow member of law enforcement, you know, there's a
19 whole series of overt acts where he opens a file and it lays
20 all that out, a fellow member of law enforcement sends
21 Mr. Bongiovanni an email that says, hey, Masecchia is an LCN
22 member or associate. So it's notice to Mr. Bongiovanni. See,
23 remember, he is part of the law enforcement community at the
24 time. It could be completely inaccurate. It could be
25 completely untrue. But he, in operating as a law enforcement

1 officer who is sworn to following his oath and give honest
2 service to the United States, he's on notice from fellow law
3 enforcement that, hey, you're looking at a Masecchia case.
4 Just so you know, he's LCN associate.

5 There are other law enforcement-related officers or
6 witnesses who would testify similarly. For example, a
7 financial analyst in the United States Attorney's Office that
8 spoke of Mr. Bongiovanni would attribute from him saying, hey,
9 these guys are X. He could be totally wrong, inaccurate, it
10 doesn't matter. It as to his moves.

11 And then separately, we'll have civilian witnesses testify
12 about Mr. Bongiovanni acknowledging his belief that
13 Mr. Masecchia was that -- was a made guy, essentially. Again,
14 could be totally wrong, but it goes to his belief, his
15 understanding. And that's the nuance that's in the
16 indictment.

17 And so then fast forward. They complained about two
18 witnesses in this small set. I gave them seven transcripts.
19 There's about 90 that went into the Grand Jury, in the specter
20 of the Grand Jury investigation, and I summarized the FBI
21 agent in docket 274.

22 And the import of that is, Gerace gets in trouble with US
23 Probation. Bongiovanni intercedes on his behalf with US
24 Probation. As alleged in the indictment, he writes a false
25 DEA-6 report to his bosses saying he's a DEA source when, in

1 fact and in truth, Mr. Gerace is not.

2 And then, he has a meeting with the FBI agent where
3 Mr. Gerace essentially sits next to Bongiovanni. Bongiovanni
4 says, oh, he's -- essentially, he's a good guy. There's not
5 much substance to the meeting. Bongiovanni leaves the FBI
6 agent with the impression that he's my informant. And, as a
7 result, the FBI leaves whatever investigation.

8 And the context of what the former prosecutor said was,
9 Mr. Bongiovanni left with trying to dissuade fellow members of
10 law enforcement from conducting investigations. Well, when
11 you say no prosecutor will ever take that case, words to that
12 effect, you're trying to dissuade a fellow member of law
13 enforcement from pursuing --

14 THE COURT: I guess I --

15 MR. TRIPI: Did I lose you, Judge?

16 THE COURT: Well, yeah. I thought we were talking
17 about IOC Mafia before that.

18 MR. TRIPI: Yeah, that's the same --

19 THE COURT: I get it. Again, I'm not following you
20 now why we're going off on a tangent.

21 MR. TRIPI: Well, that FBI agent explained his
22 investigation was to pursue essentially an IOC investigation,
23 and that Mr. Gerace was someone he targeted for investigation
24 because of his familial relationships, and then that's all
25 firsthand knowledge. That's not hearsay. That's not unduly

1 prejudicial. That's context. That's what brings that agent
2 into the meeting with Mr. Bongiovanni. So, he's conducting an
3 IOC investigation. It's not -- simply not hearsay. It's not
4 prejudicial. It's the firsthand knowledge of that agent. And
5 so, the whole premise of the fact that IOC, in that context,
6 is unduly prejudicial and inflammatory, it just doesn't hold
7 water.

8 I mean, the cases that they cite, prosecutors were saying
9 things that -- prosecutors were saying not witnesses --
10 prosecutors were saying things to the Grand Jury that the
11 courts found to be beyond the pale, you know, calling someone
12 a hoodlum or something like that should be indicted as a
13 matter of equity. That's the *Hogan* case.

14 Mr. -- a few moments ago, counsel wanted -- reminded you
15 of *Leeper* which, in 2006, I guess there's a potential you know
16 it better than I do, because I think you might have been
17 clerking for Judge Arcara back in '06 still, but if you were
18 the clerk, Judge, you'll recall that that case was on the eve
19 of trial. It was on the precipice of trial and there was an
20 element missing from the indictment.

21 The AUSA at the time essentially rushed an indictment
22 together because the Grand Jury that had heard the initial
23 indictment had expired, and in there, characterized the fact
24 that a prior Grand Jury had voted an indictment. This is just
25 to fix a typographical error and sort of --

1 THE COURT: It's all coming back to me now.

2 MR. TRIPI: -- diluted the presentation. And Judge
3 Arcara found that this was not an independent Grand Juror
4 finding and dismissed that indictment without prejudice.
5 That's not here. These are witnesses with firsthand
6 knowledge.

7 The other one is a DEA task force officer whom they've
8 characterized as a Niagara Falls Police Department Detective,
9 who was a detective, but he's also a DEA task force officer.
10 And he was conducting an investigation in or about 2013 that
11 Mr. Bongiovanni had nothing to do with. And in his view, in
12 his opinion, the people he was investigating were connected to
13 Italian organized crime. That's his personal views, personal
14 opinion, as someone who is doing the investigation.

15 And then he went on, essentially, to testify that his
16 documents outlining his investigation should not have been in
17 Mr. Bongiovanni's custody, because he learned that it was
18 found in his house. And so, that's not prejudicial. That's
19 not unduly prejudicial. It's highly probative. It's highly
20 relevant to these charges.

21 There could be an inference that a jury could later make
22 that Mr. Bongiovanni obtained a report that he shouldn't have
23 had, and certainly shouldn't have had in his house in
24 retirement, perhaps to tip people off, or to tell someone
25 about that leads to tipping off the targets of the

1 investigation. That will be up to the jury. That's what
2 trials are for.

3 And now, to the extent that they talk about Katrina
4 Gerace, it's interesting to me that I gave them seven
5 transcripts of law enforcement officers and somehow, that
6 turns into an untimely, out-of-time filing to get Katrina
7 Gerace's Grand Jury transcript. Somehow, she makes her way
8 into their filing, but they say, oh, she's all over the place
9 here and there.

10 She gave a Buffalo News interview where she acknowledged
11 she testified in the Grand Jury. The specifics are not
12 public. So, let's be accurate about what is in the public
13 realm and what is not. What's not in the public realm are the
14 specifics about what she testified about. Now, they've
15 received stuff in discovery. I turned over her jail calls
16 from 2017. I turned over a lot of stuff about her, but what
17 they don't have is the Grand Jury transcript. That's what
18 trials are for.

19 And based upon how these transcripts were handled, I'm not
20 going to turn it over until we have a firm trial date and some
21 additional protections are in place. They have not come close
22 to establishing any of the three prongs they need to, and I
23 guess that's all I have to say about it, and I'll -- unless
24 you have questions, Judge.

25 THE COURT: Thank you. Mr. LaTona?

1 MR. LATONA: Judge, if I may, he indicated that when
2 I went over there to visit, I never indicated to him it would
3 be used. What I want to do and when we went over it, he and I
4 on that case, the protective order reads in pertinent part,
5 ordered that nothing in this order shall preclude counsel for
6 the defendant or the defendant from disclosing the material
7 during the course of the litigation of this action in pretrial
8 proceedings and memoranda filed at trial or in post-trial
9 proceedings. And then it went on to say don't identify
10 individuals.

11 I was operating under that order. They drafted it. We
12 agreed to it, and you signed it. So that's how we were
13 proceeding. He wants to say that somehow, oh, our request has
14 now -- is broad, and I want to invite Your Honor's attention
15 to document 147 filed on July 12th, 2021, the original Rule 6
16 motion. And basically, going through this IOC stuff and then
17 the request -- the defense requested disclosure of all
18 evidence regarding IOC that was presented to the Grand Jury
19 with all jury instructions regarding that evidence.

20 In addition, we requested, back in July, reviewing this
21 Ms. Nigro's outing herself. The defendant submits that the
22 Court should disclose the testimony of -- all testimony
23 delivered by Ms. Nigro with any legal instructions. So, it
24 hasn't shifted at all, and that's why the pleadings that we
25 submitted supplement the original one. We've been consistent

1 from the get-go.

2 THE COURT: How would Ms. Nigro's Grand Jury
3 testimony relate to this issue about prejudicial reference to
4 Mafia, Italian organized crime?

5 MR. LATONA: Well, Judge, in a news article, she's
6 blabbing about Peter Gerace being a mobster and things like
7 that. And in a lot of the pleadings that I've -- that are
8 part of this record, I mean, I could go back and characterize
9 each document number, each exhibit number, that she's blabbing
10 at all over the western world. So, obviously, there's no
11 reason for secrecy or protection or anything, and we feel that
12 her testimony irreparably prejudiced the Grand Jury when
13 coupled with the other matters that we have brought to your
14 attention in the supplemental pleadings.

15 We do contend that there was misconduct. When you read
16 *Williams* and *Leeper*, because *Leeper* said you have a right as a
17 target to an unbiased Grand Jury. Judge Arcara followed
18 *Williams* as, indeed, he had to. But when you look at
19 *Williams*, okay, in that particular footnote where the court
20 talks about the types of misconduct and the various rules that
21 are violated that could give right to a dismissal, they
22 specifically talk about prosecutors and others.

23 Obviously, they're talking about witnesses; particularly
24 those who haven't been schooled or properly prepared by the
25 people who call them into the situation.

1 Hearsay. Okay. Here's the situation. This agent goes, I
2 want to talk to Peter Gerace because of his family
3 relationships and I'm looking at organized crime. That's what
4 I'm looking into. And I wanted to flip him. So, the hearsay
5 is not his family members, who names I never saw because they
6 were redacted. The hearsay is, these people are involved in
7 organized crime and they're his family members and he must
8 know about it. He's probably part of it, that's why I want to
9 flip him.

10 There it is. That's all in -- now, from the get-go in
11 this particular case, the prosecution has consistently
12 contended this. We're not going to prove or argue that Peter
13 Gerace was an organized crime member or that Bongiovanni was.
14 The only relevance in this case is that Bongiovanni might have
15 believed that certain people were IOC or organized crime.

16 And if that's the case, if we don't get the Grand Jury
17 disclosure, and I'm going to talk about the surplusage and get
18 that IOC out, that we've got to be severed. We've got to be
19 severed away from him because they have conceded it has no
20 relevance whatsoever to Peter Gerace.

21 MR. TRIPI: We've conceded nothing of the sort.

22 THE COURT: I can only give you about a minute.

23 MR. TRIPI: Oh, okay. We've conceded nothing of the
24 sort. In docket 178, at page 5, there's a half a sentence
25 that's inartfully written in the hundreds of thousands of

1 pages that we wrote that seizing on to say that where we said
2 that the government will not argue that Gerace members were,
3 in fact, members of IOC. What we were trying to explain there
4 is, it doesn't matter if they actually were, which I think
5 I've articulated in a number of other points in the filing.
6 Proof will certainly focus upon their reputation. As you
7 know, family reputation, there's a hearsay exception for that.

8 And defendant Bongiovanni's knowledge. Okay. As I've
9 articulated already, as it relates to Gerace, particularly if
10 he's telling people he is Mafia or he's at Pharaoh's and he's
11 saying things like, do you know who my family is? There may
12 be some testimony at trial to that effect. That goes, A, to
13 the conspiracy with Bongiovanni, but also to the force, fraud
14 and coercion aspect of the sex trafficking, the fear.

15 He's got Outlaws working for him. There may be
16 information that he's representing himself to be, maybe
17 nothing he's not, but representing himself to be a mob guy.
18 That goes to the coercive environment at Pharaoh's and the
19 victimization of certain females as we believe will show at
20 the trial to include Ms. Gerace has been -- Ms. Nigro has been
21 named a lot.

22 And we're going to wait 'til the trial to try the case,
23 but she's got her own counsel. Brian Comerford is her
24 attorney, and we believe she is going to be a victim in a
25 number of ways that sets several other people, women, in

1 Pharaoh's were also victims. And although she might not have
2 been trafficked, she's a victim here as well. And we believe
3 that's what the proof will show.

4 THE COURT: Okay.

5 MR. LATONA: One last thing. Family reputation?
6 That's nonsense unless there's concrete evidence. And Judge,
7 that kind of is a segue into the surplusage.

8 THE COURT: Okay. We're going to go into that next.
9 I just want to -- just give me one second. Megan? Are you
10 okay?

11 THE REPORTER: No, I'd like a break.

12 THE COURT: Okay. We're going to take a ten-minute
13 break. Come back at five to one.

14 (A recess was taken from 12:44 p.m. to 12:57 p.m.)

15 THE CLERK: All rise.

16 THE COURT: Have a seat.

17 THE CLERK: We are now back on the record in the USA
18 v Bongiovanni and Gerace case.

19 THE COURT: Mr. LaTona, we're going to surplusage.

20 MR. LATONA: Yes, Your Honor. That's correct. And I
21 just note for the record, Judge, document 250 is a
22 supplemental memo that I filed on this issue and attached to
23 it is a chart which specifies exactly where in the indictment
24 there is reference to IOC. So, this would be the material
25 that we would want to have --

1 THE COURT: What was that document number?

2 MR. LATONA: Two-fifty, Judge.

3 THE COURT: Okay. I'm sure I read it at one point,
4 but that will be helpful.

5 MR. LATONA: Yeah. There's a nice chart here that
6 lays out all the surplusage that we want deleted from the
7 document.

8 THE COURT: Okay.

9 MR. LATONA: Basically, all we're asking Your Honor
10 to do is to follow Judge Arcara's decision in the *Allen* case
11 where he looked at it, he found that the portions of the
12 indictment that were prejudicial would impact and possibly
13 poison the jury before any evidence was offered.

14 THE COURT: What was the surplusage? Was that --

15 MR. LATONA: Killer Kev. That was the situation.

16 Here, we want to get rid of the IOC, but in following
17 Judge Arcara's decision, we are not in any way, shape, or
18 manner even thinking of asking Your Honor to crop the trial
19 evidence.

20 Like Judge Arcara said in *Allen*, it's out of the
21 indictment. I don't want the jury prejudiced before proof
22 without allowing you -- if you can persuade me it comes in,
23 then it comes in. And that's all we've been asking and that's
24 a fair resolution. The only other thing in that particular
25 filing, Judge, was -- and I was previously unaware of it, but

1 there were two Second Circuit cases, one involving Chinese
2 individuals, the other Hispanic, where basically the Second
3 Circuit says, injecting ethnicity into a criminal prosecution
4 as some indicia of guilt is improper, and we don't want to
5 have it in the Second Circuit. And that's clear -- that
6 also -- those cases are cited in 250, which we filed at 250.

7 THE COURT: Okay. Thank, sir. Mr. Tripi?

8 MR. TRIPI: Again, Judge, this is a case -- the IOC
9 references in this case, I've read a few of them for -- to you
10 today. I won't repeat it. It's about motive and it frames
11 the context of the conspiracy that was between Mr. Bongiovanni
12 and Mr. Gerace as alleged.

13 That *Allen* case was mine. What was far different in the
14 case cited, that was before Judge Arcara, it's far different
15 in the sense that the nickname Killer Kev was labelling an
16 individual as, essentially, a killer before there was any
17 proof. And the judge --

18 THE COURT: Not an individual, the defendant.

19 MR. TRIPI: The individual defendant, yes. And the
20 judge, Judge Arcara, was persuaded by the *Farmer* case, which I
21 tried to distinguish at the time, as *Farmer* involved a
22 prosecutor getting up on summation and I think called the
23 defendant Murder, which was his alias, 40 plus times during
24 the course of the summation, if I'm not mistaken. Again, that
25 was labeling the defendant a murderer, far different here in

1 the context in which IOC is used. That's my argument. Motive
2 is always highly relevant. Motions to strike are rarely
3 granted. The allegations are not ethnicity. It's about
4 motive in this case.

5 THE COURT: Okay. All right. Mr. LaTona, since
6 you're up, we'll go to your motion to suppress. You moved to
7 suppress federal search warrants for his residence at Luxor
8 Lane on November 29th, 2019 and February 26th, 2021. A
9 federal warrant to search Pharaoh's night club -- Gentlemen's
10 Club on November 29th, 2019, and a federal search warrant to
11 search a cell phone seized from the defendant on February
12 28th, 2021.

13 MR. TRIPI: Judge --

14 MR. LATONA: That is a scatter gun. Maybe I'm --

15 MR. TRIPI: Could I -- just one question, Joe?

16 MR. LATONA: Sure. Yeah. Go ahead.

17 MR. TRIPI: I thought those issues had been already
18 litigated and decided by Judge Sinatra's orders. We litigated
19 the search warrants several times before Your Honor. Those
20 were appealed up to Judge Sinatra. That's why --

21 THE COURT: The issue about whether they should be
22 sealed or unsealed?

23 MR. TRIPI: Sealed or unsealed as well as Franks
24 hearing. Those issues also went up to Judge Sinatra, so I
25 just don't know what remains.

1 THE COURT: I think Mr. LaTona is about to tell us.

2 MR. TRIPI: I might not agree.

3 MR. LATONA: Judge, yeah. I mean, it's right that we
4 originally moved to have the applications unsealed. You
5 disagreed. Judge Sinatra disagreed. But in his opinion, he
6 said not at this stage, not at this stage. And he cited an
7 Eastern District case, *United States v. Howlett*.

8 Now, in *Howlett*, the parties, the prosecution and defense,
9 agreed that three months prior to the trial, the applications
10 would be given to the defense and the defense given several
11 weeks to make suppression motions. That is an issue that's up
12 in front of Judge Sinatra. Quite frankly, I did do a scatter
13 gun situation on these applications and these warrants that I
14 haven't looked at. The one only I could look at and have
15 addressed is the cell phones warrant.

16 THE COURT: Cell phones.

17 MR. LATONA: And as Your Honor will recall, I wanted
18 a Franks hearing. You disagreed. The Court indicated -- you
19 said I can do it on the face of the application and basically,
20 the issues that are -- would warrant suppression is, number
21 one, there's no nexus between the telephone and the so-called
22 use and distribution of narcotics by Mr. Gerace. No
23 indication that any of these people who claim they saw him in
24 possession at his business or at his home, that they were
25 invited there over the phone. No nexus whatsoever. And I

1 know that Mister -- the government has indicated, well, the
2 affiant talked about his training and experience. We've cited
3 a number of cases to Your Honor indicating that just doesn't
4 cut it. There has to be specific factual allegations with
5 regard to nexus.

6 The other thing, Judge, regards staleness, because these
7 allegations are in there, but there's no statement as to when
8 they happened. And Your Honor will recall in the pleading --

9 THE COURT: We had that argument, right? You brought
10 up the staleness before?

11 MR. TRIPI: Yes.

12 MR. LATONA: Yes, I did. That -- I brought it up in
13 the context of let's have a Franks hearing. You disagreed.
14 Now I'm bringing it up in the context it's facially
15 insufficient on the face of the warrant.

16 THE COURT: Based on staleness?

17 MR. LATONA: Exactly, because I never -- they never
18 said it.

19 THE COURT: Okay.

20 MR. LATONA: Judge, one other thing on this. We made
21 a motion under Rule 12 for the disclosure of various
22 evidentiary items to see if we should suppress it. Now, what
23 Your Honor did is, Your Honor said, look. And we also --
24 that's the motion we made to unseal the warrants. You said, I
25 just want to deal with the warrants. I don't want to deal

1 with this other stuff. So, this is docket number 113. So,
2 the second motion about the Rule 12 request is still
3 outstanding.

4 For instance, in our request, we ask were there any
5 intercepted communications, any kind of wiretapping, any kind
6 of bugging or were there any warrantless seizures of material.
7 Now, I understand the government -- we asked for it
8 informally. They said make a motion. We did make a motion.
9 So, now it's ripe for your decision.

10 But what I understand from Mr. Gerace is that in
11 approximately at some point in 2019, he was abroad. He came
12 back and his cell phone was seized. And other lawyers were
13 involved a little bit at that point. And my understanding is
14 what Mister --

15 THE COURT: This was when, Mr. LaTona?

16 MR. LATONA: Twenty-nineteen. This is a warrantless
17 seizure of --

18 THE COURT: Now, this is the first I've heard of
19 this, right?

20 MR. LATONA: No, I -- Judge, we have asked -- I
21 understand. I'm not --

22 MR. TRIPI: Hang on right there. They've had
23 discovery of that since the minute they were indicted, all
24 right? So, this is not new information. So, don't say that
25 the defense -- Mr. Daniels had it, Mr. Cohen has it, and

1 Mr. LaTona has it.

2 MR. LATONA: Well, what we wanted was all of the
3 information and, you know, whatever they had extracted. Then,
4 here's the one thing --

5 MR. TRIPI: They have all of that.

6 MR. LATONA: Here's the one thing we don't know. Was
7 that used in any way, shape, or manner to get the warrant in
8 2019? We don't know that, because we've never seen those
9 applications. So, that, you know, that's an issue that we
10 have.

11 MR. TRIPI: If he's got a border search issue, he's
12 never raised it. They've been provided the extraction two
13 years ago roughly, information from the extraction, texts
14 between Bongiovanni and Gerace, whole bunch of information
15 from the extraction --

16 THE COURT: Can you just tell me -- he looked at the
17 border search?

18 MR. TRIPI: Yeah. So, Mister -- within a short
19 period of time from when Mr. Bongiovanni travelled, Mr. Gerace
20 also travelled. He was also subject to a border search. Same
21 thing --

22 THE COURT: Where did he travel to?

23 MR. TRIPI: He traveled -- the name of the country
24 where he was escapes me. If I said the Dominican, I might be
25 wrong. I might be conflating the two. It was somewhere in

1 the Caribbean.

2 THE COURT: And essentially, something very similar
3 happened?

4 MR. TRIPI: Something very similar happened. His
5 phone was seized, searched, returned to Mr. Eoannou within a
6 couple days. His phone was given back to him, and law
7 enforcement retained the extraction and did conduct an
8 investigation.

9 They've had that information for about two years, so if
10 they wanted to move to suppress it, they should have. I
11 thought they were making a tactical decision to try to
12 distance themselves from that phone. I have no idea. But
13 they've had that stuff. I have a discovery binder. I can
14 tell you exactly when, but it was a couple years --

15 THE COURT: What about Title 3?

16 MR. TRIPI: There were no Title 3 intercepts. And,
17 in fact, the indictment here, there's an overt act that's a
18 voicemail message. I don't remember the number of the overt
19 act, I can look it up, but there's a voicemail message that's
20 left to Bongiovanni from Gerace. That was from Gerace's
21 phone. That's how we got it. So, that information is
22 essentially on the face of the indictment.

23 THE COURT: And the defendants have that?

24 MR. TRIPI: Yes. Yes.

25 MR. LATONA: What we don't have is whether or not

1 anything -- any of that material was used to get the search
2 warrants.

3 MR. TRIPI: That's irrelevant.

4 MR. LATONA: It's not irrelevant.

5 THE COURT: Yeah, but -- yeah, well, I guess, why
6 would it be relevant?

7 MR. LATONA: Well, it could be relevant in terms of
8 any kind of potential taint. I mean, if we don't know --

9 THE COURT: Taint from what?

10 MR. LATONA: From improper seizure of --

11 THE COURT: Yeah, but you didn't move to suppress
12 that. You've had the information. You didn't move to
13 suppress that.

14 MR. LATONA: That's because we don't know whether or
15 not they're in the warrants.

16 THE COURT: No. I think that boat has sailed,
17 Mr. LaTona.

18 MR. LATONA: Okay. Judge, the only other thing is
19 Bill of Particulars. We'll rely on the pleadings.

20 THE COURT: Okay. Well, you also have a motion to
21 dismiss Count 7 and Count 9. You want to just rely on the
22 papers for that?

23 MR. LATONA: Yeah. I'm going to rely on the papers
24 for anything that's outstanding, and wrap it up.

25 THE COURT: Okay. All right. Thank you, sir.

1 Mr. Harrington?

2 MR. TRIPI: Judge, just on the *Howlett*, I think all
3 those issues are up in front of Judge Sinatra in terms of
4 search warrants and I would say that what was argued here
5 regarding the cell phones is a rehash or regurgitation of
6 issues you and Judge Sinatra have decided regarding the Gerace
7 cell phone.

8 THE COURT: Regarding what?

9 MR. TRIPI: The Gerace cell phone. Mr. LaTona
10 started repeating arguments that I believe have already been
11 decided.

12 THE COURT: Yeah, but is Judge Sinatra deciding --
13 he's got an argument, from what he knows from, I mean, because
14 we didn't unseal the cell phone thing, right?

15 MR. TRIPI: Judge Sinatra indicated to me there might
16 come a point in time, and Mr. LaTona can correct me if I'm
17 misstating it, but there may come a point in time where Judge
18 Sinatra may ask me to go in chambers, create a record of
19 ongoing nature of the investigation and he'll assess from
20 there.

21 THE COURT: I got that. But is there a reason -- now
22 he's raising an argument about staleness, right? The warrant
23 was known -- from what he has, the information he has, the
24 warrant is no good because of staleness. Why can't I address
25 that now?

1 MR. TRIPI: I think you already did. That's what I'm
2 saying. I think that was already addressed by yourself and
3 Judge Sinatra. If I'm wrong --

4 THE COURT: I'll double check.

5 MR. TRIPI: If I'm wrong, I think we addressed
6 staleness in the affidavit in terms of ongoing --

7 MR. LATONA: No, no. Judge, the only thing that
8 you've decided, I used staleness as a predicate to get a
9 Franks hearing. You said no. End of story. It's still
10 viable on the face of the affidavit.

11 THE COURT: And you're also saying, without a Franks
12 hearing or whatever, the information was stale and it
13 should -- the warrant shouldn't have been issued?

14 MR. LATONA: Right.

15 THE COURT: I don't think I decided that already.
16 I'll figure that out. All right. Mr. Harrington?

17 MR. HARRINGTON: Judge, I think most of what I have
18 to do here is just really housekeeping.

19 THE COURT: Okay. Okay.

20 MR. HARRINGTON: As I prepared for this, I realize I
21 should have apologized to the Court for, I think, for the
22 forms of these motions. I think we all tried to work through
23 it when we had a superseding indictment, but anyway -- because
24 there's some cross-pollination here on motions and the others.

25 One motion, Judge, from docket number 81 which were our --

1 excuse me. I am going backwards here. It should start with
2 docket number 81. That is January of 2021. Judge, in that
3 motion, there are a number of bases that we're asking the
4 Court to consider dismissal of the counts of the indictment
5 against Mr. Bongiovanni and one of them is the motion for
6 vindictive prosecution.

7 The problem with that motion, Judge, is we briefed it, and
8 it's in the motion, but as this case goes along and the closer
9 it gets to trial, this is probably a motion that if it is
10 completely addressed is probably going to really wait until
11 just before trial, I would assume, because I think that when
12 we get 3500 material, there's going to be a lot more
13 information to go to, but we filed it just to preserve the
14 issue, Judge.

15 Judge, there's motions for Bills of Particulars in both
16 this motion and in the one that was filed on docket number
17 149. And, for this motion, it's -- what we've asked for are
18 paragraphs -- pages 33 through 36 in our memo. That's for the
19 81 docket. And for the 149 docket, for our July 12th, '21
20 motion, it's paragraphs 11 through 28. We've asked for
21 extensive Bills of Particulars. I won't raise any further
22 argument unless the Court wants.

23 THE COURT: Okay.

24 MR. HARRINGTON: Judge, I think we've addressed the
25 suppression issues. One was withdrawn. The other, we had a

1 hearing on. There is, in our motions, a request for the Court
2 to look at the no-knock part of the search warrant that was
3 granted and we're still reserving that. We have an extensive
4 brief on that.

5 And then, Judge, the other things that are remaining are
6 just standard things like 404(b), 609, and when the 3500
7 material is supplied, but the last real motion that's
8 extremely important, and you asked Mr. LaTona about it, are
9 the severance on Counts 7 and 9. I don't know if, Judge, you
10 were going to deal with severance or you want the trial judge
11 to do it?

12 THE COURT: Usually I defer to the trial judge.

13 MR. HARRINGTON: As that applies for counts and
14 people, correct?

15 THE COURT: Right. That's how the judge is going to
16 run the trial, and I don't like to step on their toes.

17 MR. HARRINGTON: We wanted just to preserve that.

18 THE COURT: Oh, no. Okay. There's your motion to
19 sever from Mr. Gerace on Count 7 and 9, and Mr. Gerace's
20 motion to sever from Mr. Bongiovanni on Count 2 and 8.

21 MR. HARRINGTON: Right.

22 MR. TRIPI: And then Mr. Gerace wants to sever his
23 Counts 2 and 8 from 7 and 9, I believe. So we're looking at
24 four trials if they get their way, Judge.

25 MR. HARRINGTON: Judge, the only reason I'm standing

1 here is because I didn't want these younger people to think I
2 couldn't.

3 THE COURT: All right.

4 MR. TRIPI: Judge, the only thing I have left to say
5 is, on the no-knock warrant, we'll rely on our briefing for
6 every area that Mr. Harrington is relying on his briefing. As
7 it relates to the no-knock warrant, suppression would not be a
8 remedy under *Hudson v. Michigan*, Supreme Court case in *US v*
9 *Acosta*, Second Circuit 2007. The cases cited by the defense,
10 where suppression was contemplated, predate those controlling
11 precedents. That's our position. Thank you.

12 THE COURT: Anything else?

13 MR. HARRINGTON: No, Judge.

14 THE COURT: Mr. Tripi, I'm going to give you an
15 opportunity, if you want to, to brief further the first issue
16 we discussed today, the phones. Hang on one second. Okay.
17 If you wanted to brief -- if you want to really hone down on
18 the best cases you got for routine versus non-routine search.
19 If it's not routine, what specific evidence there is in the
20 record, as it now stands, that there was reasonable suspicion
21 here, and your position regarding reopening the hearing.

22 Okay. Also, there was -- a case just came out a couple
23 days ago in the Eastern District of New York *United States vs.*
24 *Kamaldoss*. Looking for the cite here. I don't see it on this
25 copy that I have. That was in the Eastern District, came out

1 April 22nd, 2022. I'll give you two weeks to do that,
2 Mr. Tripi.

3 MR. TRIPI: Sure.

4 THE COURT: Mr. Harrington, I'll give you a week or
5 do you want two weeks to respond?

6 MR. HARRINGTON: A week is all right, Judge.

7 THE COURT: So, two weeks.

8 THE CLERK: May 10th, and the response will be May
9 17th.

10 THE COURT: At that point, I'll consider all the
11 motions submitted.

12 MR. TRIPI: Yes, Judge. Thank you.

13 MR. HARRINGTON: Judge, will you make it two weeks?
14 I've got another thing coming up.

15 THE COURT: Got you.

16 THE CLERK: May 24th.

17 MR. HARRINGTON: Thank you.

18 THE COURT: Things else then, Mr. Tripi?

19 MR. TRIPI: No. Thank you, Judge.

20 THE COURT: Mr. Dickson?

21 MR. DICKSON: No, Your Honor.

22 MR. CULLINANE: Nothing from me.

23 THE COURT: Mr. LaTona?

24 MR. LATONA: No thanks, Judge.

25 THE COURT: Mr. Harrington?

1 MR. HARRINGTON: No, Judge.

2 THE COURT: All right. Have a great day. Stay safe.

3 (Proceedings concluded at 1:17 p.m.)

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I certify that the foregoing is a
correct transcription of the proceedings
recorded by me in this matter.

s/ Megan E. Pelka, RPR

Official Court Reporter